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## Equal Protection for Foreign and Alien Corporations: Towards Intermediate Scrutiny for a Quasi-suspect Classification

Hartwin Bungert

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# **Equal Protection for Foreign and Alien Corporations: Towards Intermediate Scrutiny for a Quasi-suspect Classification**

*Hartwin Bungert\**

I.	Introduction . . . . .	572
II.	Current Equal Protection Doctrine . . . . .	577
	A. Rational Basis Test . . . . .	577
	B. Strict Scrutiny . . . . .	579
	C. Differences Between the Two Fundamental Tests . . . . .	582
	D. Intermediate Scrutiny . . . . .	583
III.	Equal Protection of Alien Natural Persons . . . . .	585
	A. Discrimination by the States . . . . .	585
	1. The Pre-Burger Court . . . . .	585
	2. The Burger Court . . . . .	586
	3. Reasons for Applying Strict Scrutiny . . . . .	588
	4. The Political Function Exemption From the Strict Scrutiny Test . . . . .	590
	5. The Illegal Aliens Exemption From the Strict Scrutiny Test . . . . .	592
	B. Discrimination by the Federal Government . . . . .	593
	1. The Doctrine of the Supreme Court . . . . .	593
	2. Different Concepts . . . . .	595
	3. Critique . . . . .	595
IV.	Equal Protection for Alien and Foreign Corporations . . . . .	597
	A. Applicability of the Equal Protection Clause to Foreign and Alien Corporations on a Conflict of Constitutional Laws Level . . . . .	600
	1. First Step: Overcoming the "Artificial Person" Doctrine . . . . .	600
	2. Applying Equal Protection to Foreign and Alien Corporations . . . . .	601

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3.	Interpretation of "Within its Jurisdiction" . . . . .	602
4.	Approaching a Subjection Factor? . . . . .	605
5.	Constitutional Right to be Admitted to do Business? . . .	606
B.	Equal Protection Standard of Review Currently Used . . . . .	609
1.	Traditional Jurisprudence of the Supreme Court . . . . .	609
2.	Supreme Court on the Way Towards a Slight Tightening of the Standard of Review? . . . . .	611
3.	Different Concepts in Constitutional Doctrine . . . . .	612
C.	Strict Scrutiny for Discrimination Against Alien Corporations? . . . . .	613
1.	Corporate Nationality as Suspect Classification? . . . . .	613
a.	Prejudice Against a Discrete and Insular Minority . .	613
b.	History of Discrimination . . . . .	615
c.	Lack of Democratic Representation . . . . .	616
d.	Unalterable Trait . . . . .	618
e.	Parallel to Nonresidency? . . . . .	619
f.	Parallel to the Political Function Exemption? . . . . .	619
g.	Summary . . . . .	620
2.	Parallel to the Right to Travel as a Fundamental Right? . . . . .	620
a.	The Doctrine of Fundamental Rights Equal Protection . . . . .	620
b.	Right to Interstate Migration for Foreign Corporations? . . . . .	622
c.	Expansion to Alien Corporations? . . . . .	624
d.	Right of Access to Courts . . . . .	626
3.	Significance of Qualification for Doing Business Under the Equal Protection Doctrine . . . . .	627
a.	Requirements and Consequences of Qualification . . .	627
b.	Significance of Qualification According to the Traditional Concept . . . . .	628
c.	Significance of Qualification Under a Modern Concept . . . . .	629
4.	Unconstitutional Unequal Treatment of Alien Natural and Alien Juridical Persons Under the Equal Protection Clause Itself? . . . . .	630
5.	Different Standard of Review for Federal and State Differentiations . . . . .	632
6.	Distinguishing Other-Country Corporations and Other-State Corporations . . . . .	633
7.	Domestic Corporations Controlled by Aliens . . . . .	633
8.	Reverse Discrimination Under the Equal Protection Clause . . . . .	634
9.	Summary . . . . .	635

V. Privileges and Immunities Clause .....	636
VI. Impairment of Obligations of Contract Clause .....	638
VII. Commerce Clause .....	639
VIII. Summary of the New Standard of Review .....	640
IX. Exemplary Application of the Standard of Review Proposed ....	641
A. Review of Typical Justifications for Discriminations Against Foreign/Alien Corporations .....	641
1. National Security .....	641
2. Protection of Domestic Employees Against Unemployment .....	645
3. Lack of Consent to U.S. Economic Policy .....	646
4. General Protection Against Alien Control .....	647
5. Protection of the Local Economy .....	648
6. Protection of Domestic Legal Relations .....	650
7. Protection of Certain Key Industries .....	651
a. Example: Banking Industry .....	651
b. Example: Radio Communications .....	653
c. Example: Insurance Industry .....	654
8. "Bounty" Theory .....	655
9. Requirement of Reciprocity .....	656
10. Formal Disclosure, Report and Permit Requirements ...	658
B. Review of Exemplary Statutory Provisions Restricting Foreign or Alien Corporations .....	659
1. Restrictions on Land Transfer .....	659
2. Qualification Statutes .....	662
a. Commerce Clause .....	662
b. Equal Protection Clause .....	662
3. State Pseudo-Foreign Corporations Statutes .....	663
a. Commerce Clause .....	663
b. Full Faith and Credit Clause .....	665
c. Equal Protection Clause .....	666
4. Domestication Statutes .....	667
5. State Taxation of Foreign Corporations .....	668
a. Equal Protection Clause .....	668
b. Due Process Clause .....	670
c. Commerce Clause .....	671
X. Conclusion .....	672
A. Standard of Review .....	672
B. Practical Application of the Standard of Review .....	675

## I. INTRODUCTION

State statutory legislation and, to a lesser extent, federal statutory legislation often discriminates against foreign and alien corporations.<sup>1</sup> So far, this kind of discrimination against corporations is not accorded much attention in U.S. equal protection doctrine, although the discrimination of alien, natural persons has been topic of much debate and of some well-known Supreme Court cases. This article argues for application of at least an intermediate level of scrutiny, if not strict scrutiny, for classifications on the ground of "corporate nationality" under the Equal Protection Clause of the U.S. Constitution.

In detail, there will be four main lines of thought. First, equal protection doctrine of discrimination against alien natural persons should be applied analogously to discrimination against alien and foreign corporations. Second, using a four factor test, "foreign and alien corporate nationality" should be considered as a semi-suspect, if not a suspect classification, triggering at least intermediate scrutiny, if not strict scrutiny. Third, classifications based upon alien and foreign corporate nationality also touch upon the fundamental right of interstate migration. Fourth, granting an intermediate level of constitutional scrutiny to discrimination against alien and foreign corporations under the Equal Protection Clause would harmonize the levels of scrutiny among the somewhat structurally related constitutional guarantees for foreign or alien corporations by the interstate and foreign Commerce Clause, the Privileges and Immunities Clause and the Impairment of Obligations of Contracts Clause, even if the latter is no longer applied in practice. Furthermore, discrimination against foreign (out-of-state) corporations should be reviewed under the same level of scrutiny as discrimination against alien (out-of-country) corporations.

The argumentative line of this article also touches upon the theories of corporate personality,<sup>2</sup> which itself is linked to the premier question of whether any of the fundamental rights of the U.S. Constitution are applicable

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1. Several examples will be discussed *infra* at part X.A-B.

2. See, e.g., PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW—THE SEARCH FOR A NEW CORPORATE PERSONALITY (1993); Phillip I. Blumberg, *Corporate Personality in American Law*, 38 AM. J. COMP. L. SUPPL. 49 (1990); Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory in CORPORATIONS AND SOCIETY—POWER AND RESPONSIBILITY* 13 (Warren J. Samuels & Arthur S. Miller eds., 1987) [hereinafter Horwitz, *Santa Clara*]; Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641 (1982); Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987) [hereinafter Comment, *Personification*]. For a historical overview of the different concepts see Arthur W. Machen, *Corporate Personality*, 24 HARV. L. REV. 253 (I) and 347 (II) (1911).

to foreign or alien corporations in the first place and how nationality of corporations is to be defined for constitutional law purposes. This area of law could be described as conflict of constitutional laws. It is structurally comparable to the conflict of laws questions in, for instance, contracts or torts law. In this context *CTS Corp. v. Dynamics Corp. of America*<sup>3</sup> and the question whether the incorporation rule has been implanted constitutional ranking by this decision could play a leading role.

Relying especially on holdings of the Supreme Court, it was initially denied that the notion of "national" could be used for a corporation. This notion was seen as insoluble, connected to the connotation of personal allegiance towards the sovereign state which only a person of flesh and blood could have.<sup>4</sup> But in modern U.S. law the notion of corporate nationality is used unhesitatingly.<sup>5</sup> Professor Vagts was probably the first to speak of the "corporate alien" and "corporate alienage," even using the expression "corporate citizenship."<sup>6</sup> Inclining toward that expression this article will use the expressions "corporate alien nationality" and "corporate foreign nationality."

In many states "foreign corporations" are not defined by case law, but by statutory law. For instance, for corporate law and the question of doing

3. 481 U.S. 69 (1987). Cf. *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

4. Vgl. Herman Walker, *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373, 377-78 (1956) and references therein.

5. See, e.g., PHILLIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS—PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS* 407 *et passim* (1983 & Supp.); Yitzhak Hadari, *The Choice of National Law Applicable to the Multinational Enterprise and the Nationality of Such Enterprises*, 1974 DUKE L.J. 1, 3; Heinrich Kronstein, *The Nationality of International Enterprises*, 52 COLUM. L. REV. 983 (1952); E. Hilton Young, *The Nationality of a Juristic Person*, 22 HARV. L. REV. 1 (1909); Comment, *The "Nationality" of International Corporations under Civil Law and Treaty*, 74 HARV. L. REV. 1429 (1961). See also ERNST RABEL, 2 *THE CONFLICT OF LAWS—A COMPARATIVE STUDY* 17-27 (2d ed. 1960); I.F.G. Baxter, *The Recognition of Foreign Corporations—A Proposal for Simplification*, 40 CAN. B. REV. 165 (1962); George A. Van Hecke, *Nationality of Companies Analysed*, 8 NEDERLANDS TIJDSCHRIFT INT. R. 223 (1961); Vaughan Williams & Matthew Chrussachi, *The Nationality of Corporations*, 49 L.Q. REV. 334 (1933). In Spanish law the notion of "nacionalidad de las personas jurídicas" is used without hesitation. See, e.g., ADOLFO MIAJA DE LA MUELA, 2 *DERECHO INTERNACIONAL PRIVADO (PARTE ESPECIAL)* 112-15 (10th ed. 1987).

The RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 213 (1986), under the heading of "Nationality of Corporations," defines nationality of corporations: "For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized." *Id.*

6. Detlev F. Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise*, 74 HARV. L. REV. 1489, 1524-26 (1961).

in-state business the Revised Model Business Corporation Act defines a foreign corporation as "a corporation for profit incorporated under a law other than the law of this state."<sup>7</sup> Most commonly "foreign" corporations are contrasted with "domestic" corporations, as for instance in *Fletcher Cyclopedia*: "With respect to a particular state or country a corporation created by or under the laws of that state or country is a 'domestic corporation', and any corporation that owes its existence to the laws of another state, government or country is a 'foreign corporation.'"<sup>8</sup> Sometimes nationality of a corporation is used in a wider sense including the related, but more narrowly drafted concepts of corporate "domicile," "citizenship," and "residence." The term is understood as the relationship between corporation and state that enables the legislative, judicial, and executive powers to connect that state for a specific legal purpose with the corporation.<sup>9</sup>

Courts often circumscribe the relation of a corporation towards its incorporation as corporate domicile.<sup>10</sup> But this unfortunate wording is rightly criticized: The functions the notion of domicile fulfills for natural persons—particularly in family law—cannot be transferred to corporations. The expression is tailored to appearances of family life and does not fit a corporate structure and the business world. The objective factor of the notion of domicile, i.e., physical presence,<sup>11</sup> cannot be defined for a corporation, because a corporation is "present" in every state it is doing business in.<sup>12</sup>

7. REV. MODEL BUSINESS CORP. ACT § 1.40(10) (1984).

8. 17 FLETCHER CYC. § 8290 (1987).

9. Hadari, *supra* note 5, at 4; 19 C.J.S. *Corporations* § 886 (1990).

10. *See, e.g.*, *Ohio & Mississippi R.R. v. Wheeler*, 66 U.S. (1 Black) 286 (1862); *Johnson & Johnson v. Picard*, 282 F.2d 386 (6th Cir. 1960); *Gay v. Bessemer Properties, Inc.*, 32 So. 2d 587 (Fla. 1947); *State v. Riss & Co.*, 335 S.W.2d 118 (Mo. 1960); *In re Roche's Estate*, 109 A.2d 655 (N.J. 1954). *See also* HARRY G. HENN & JOHN R. ALEXANDER, *LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES* § 81 (3d ed. 1983 & 1986 Supp.); Roberta Romano, *Law as Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORGAN. 225, 280 (1985).

11. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 16 (1969); ROBERT A. LEFLAR ET AL., *AMERICAN CONFLICTS LAW* 20-22 (4th ed. 1986); EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* 182-84 (2d ed. 1992).

12. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 cmt. 1 (1969); HENN & ALEXANDER, *supra* note 10, at 153; SCOLES & HAY, *supra* note 11, at 213-14; Joseph F. Francis, *Domicile of a Corporation*, 38 YALE L.J. 335, 343-58 (1929); Jack L. Goldsmith, Note, *Interest Analysis Applied to Corporations: The Unprincipled Use of A Choice of Law Method*, 98 YALE L.J. 597, 602-03 (1989). For a restricted use of the expression of "corporate domicile" with contents changing according to the respective context see LEFLAR ET AL., *supra* note 11, at 29-30. *See also* Rabel, *supra* note 5, at 27-30.

Also, under the subjective element of domicile, the so-called *animus manendi*,<sup>13</sup> a juricial person unable to form its own will cannot have and does not appear realistic, in view of the economic practice. The incorporation state serves as "residence" of a corporation, even if the corporation does no business there and none of its shareholders, directors, officers or agents have their residence there.<sup>14</sup> Corporate residence and nationality are most often equated,<sup>15</sup> as is "domicile," if in the respective context the law of the state of incorporation rules.<sup>16</sup>

In principle, "other-state corporations," also referred to as "out-of-state corporations" or "foreign corporations," are distinguished from "other-country corporations," known also as "out-of-country corporations" or "alien corporations."<sup>17</sup> However, the term "foreign corporations," particularly in statutes, sometimes is used as a category for corporations from other countries as well as from other states.<sup>18</sup> *Goodman* demonstrates that for purposes of regulating foreign corporations' doing business practically all states extend by statutory<sup>19</sup> or even constitutional<sup>20</sup> precept provisions applicable to foreign corporations to alien corporations also.<sup>21</sup> However, most of the writings on

13. See, e.g., LEFLAR ET AL., *supra* note 11, at 20-22; SCOLES & HAY, *supra* note 11, at 185-86; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 18 (1969).

14. McKendrick v. Western Zinc Min. Co., 130 P. 865, 867-68 (Cal. 1913); Home Savings & Loans Ass'n v. Iowa City Inn, Inc., 152 N.W.2d 588 (Iowa 1967); Ireland v. Globe Milling & Reduction Co., 32 A. 921 (R.I. 1895); 17 FLETCHER CYC. CORP. § 8298 (1987).

15. See, e.g., M. Tedeschi, *The Determination of Corporate Nationality*, 50 AUSTL. L.J. 521 (1976).

16. See HENN & ALEXANDER, *supra* note 10, at 154-55; Tedeschi, *supra* note 15, at 521.

17. See, e.g., National Steamship Co. v. Tugman, 106 U.S. 118 (1882); Baumgarten v. Alliance Assurance Co., Ltd., of London, England, 153 F. 301 (N.D. Cal. 1907); 17 FLETCHER CYC. CORP. § 8290 (1987).

18. See, e.g., DEL. GEN. CORP. L. § 371(a), DEL. CODE ANN. tit. 8, § 371(a) (1993); 19 C.J.S. *Corporations* § 883 (1990); DETLEV F. VAGTS, *TRANSNATIONAL BUSINESS PROBLEMS* 103 (1986). In Nebraska, for instance, according to statutory definition "foreign corporations" means foreign and alien corporations, insofar as in the individual context this use would not violate the U.S. Constitution, NEB. REV. STAT. § 21-10, 132 (1991).

19. E.g., California: CAL. CORP. CODE § 171 (West 1993).

20. E.g., in Idaho: IDAHO CONST. art. XI, § 10 (Michie 1992) and IDAHO CODE § 30-1-2(b) (1992).

21. See the state synopsis in Gary A. Goodman, *Federal and State Disclosure Requirements and Restrictions in Connection with U.S. Acquisitions by Foreign Purchasers*, 21 REAL PROP. PROB. & TR. J. 623, 635-71 (1986).



foreign corporations, in the context of doing business, or conflict of laws probably implicitly refer only to out-of-state corporations.<sup>22</sup> In this Article, in principle, the term foreign corporations will be juxtaposed to alien corporations.

This Article will first provide an overview of current equal protection doctrine (Part II) and elaborate on equal treatment of alien natural persons in particular (Part III). It will then discuss traditional equal protection doctrine relating to foreign and alien corporations (Part IV B) and develop a new approach, also dealing with special questions such as distinctions between other-country and other-state corporations or domestic corporations controlled by alien persons (Part IV C). In this context, two categorical levels are distinguished, a primary so-called conflict of constitutional laws level (Part IV A) and the level of substantive constitutional law (Part IV B and C). Next, a comparison of the Privileges and Immunities Clause (Part V), the Impairment of Obligations of Contract Clause (Part VI), and the Commerce Clause (Part VII) will follow. This overview will be used to claim that there is a similar standard of intensified constitutional review under these constitutional provisions protecting against discriminatory structures. After a summary of the discussion (Part VIII), the new standard of review for discriminations against foreign and alien corporations will be applied—as a test of its practical implications—to typical justifications advanced for discriminations against foreign or alien corporations (Part IX A) and to exemplary statutory provisions restricting foreign or alien corporations (Part IX B).<sup>23</sup> The Conclusion (Part X) will sum up the discussion and establish the results.

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22. See also Leo M. Drachsler, *The Status of Alien Corporations in the Law of the United States*, 23 FORDHAM L. REV. 49 (1954).

23. Legal reality of treatment of alien corporations is immensely complicated by several nets of bilateral and multilateral international treaties which contain general and/or specific (designed for certain areas of law) most favored nation clauses, nondiscrimination clauses and, particularly, national treatment clauses. The most important category is that of treaties of friendship, commerce and navigation (FCN-treaties). This topic cannot be dealt with in this article. For an intensive treatment see, instead, my treatise HARTWIN BUNGERT, DAS RECHT AUSLÄNDISCHER KAPITALGESELLSCHAFTEN AUF GLEICHBEHANDLUNG IM DEUTSCHEN UND US-AMERIKANISCHEN RECHT—ZUGLEICH EIN BEITRAG ZU EINEM INTERNATIONALEN GRUNDRECHTSKOLLISIONSRECHT [Equal Protection for Alien Corporations under German and American Law—A Contribution to a Concept of Conflict of Constitutional Rights] (1994) [hereinafter BUNGERT, ALIEN CORPORATIONS].

## II. CURRENT EQUAL PROTECTION DOCTRINE

Discriminative acts and omissions by the states are controlled by the Equal Protection Clause of the Fourteenth Amendment.<sup>24</sup> For discriminative acts by the federal government, the Supreme Court<sup>25</sup> considered the Equal Protection Clause as implicitly comprised in the Due Process Clause of the Fifth Amendment<sup>26</sup> addressed to the federal government.<sup>27</sup> This interpretative step of the Court is part of the concept of substantive due process.<sup>28</sup>

### A. Rational Basis Test

The Supreme Court's current equal protection doctrine transcends the simple constitutional wording of the Equal Protection Clause.<sup>29</sup> In the beginning, the Supreme Court in reviewing a state regulation classifying two groups demanded only reasonableness of the criterion of differentiation in

24. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1, cl. 2.

25. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Lochner v. New York*, 198 U.S. 45 (1905); *see also* *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

26. "nor shall any person . . . be deprived of life, liberty, or property, without due process of law" U.S. CONST. amend. V.

27. 2 CORWIN ON THE CONSTITUTION § 123 *et seq.* (Richard Loss ed., 1987); Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541 (1977); as to the incorporation of the Bill of Rights in the Fourteenth Amendment *see generally* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992). For a critique *see* Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 995-96 (1979).

28. *See* MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 343-44 (1989); Karst, *supra* note 27, at 542-44; *see also* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993).

29. For fundamental readings on equal protection doctrine *see* Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982); Stephen J. Burton, Comment, "Empty Ideas": Logical Positivist Analyses of Equality and Rules, 91 YALE L.J. 1136 (1982); Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); Anthony D'Amato, *Is Equality a Totally Empty Idea?*, 81 MICH. L. REV. 600 (1983); Peter Westen, *On "Confusing Ideas": Reply*, 91 YALE L.J. 1153 (1982) and Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604 (1983); summarizing PETER WESTEN, *SPEAKING OF EQUALITY* (1990).

relation to the goal of differentiation.<sup>30</sup> The legislature possesses a wide range of discretion which is only surpassed by an "irrational" or "arbitrary" classification.<sup>31</sup> This very lenient review by the Court became known as "rational basis test" or "low level test."<sup>32</sup> It dominates in the area of economic and social legislation.<sup>33</sup> The criterion of review under the rational basis test has been formulated in different ways.<sup>34</sup>

30. *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) ("The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose."). See also *Vance v. Bradley*, 440 U.S. 93, 97 (1979); THE CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION, ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JULY 2, 1982 at 1697-1702 (Congressional Research Service ed., 1987 & 1988 Supp.) [hereinafter Congressional Research Service]; Michael W. Dowdle, Note, *The Descent of Antidiscrimination: On the Intellectual Origins of the Current Equal Protection Jurisprudence*, 66 N.Y.U. L. REV. 1165, 1169-90 (1991).

31. See JACK GREENBERG, CASES AND MATERIALS ON JUDICIAL PROCESS AND SOCIAL CHANGE: CONSTITUTIONAL LITIGATION 373 (1987); Hartwin Bungert, *Gleichberechtigung von Mann und Frau im amerikanischen und deutschen Verfassungsrecht* [Equal Protection for Men and Women in US and German Constitutional Law], 89 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT [ZVglRWiss; German Journal of Comparative Jurisprudence] 441, 450 (1990); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1068 *et seq.* (1979); James A. Hughes, Comment, *Equal Protection and Due Process: Contrasting Methods of Review under Fourteenth Amendment Doctrine*, 14 HARV. C.R.-C.L. L. REV. 529, 534-35 (1979) [hereinafter Comment, *Contrasting Methods*].

32. See 2 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW—SUBSTANCE AND PROCEDURE § 18.3 (1986) [hereinafter ROTUNDA ET AL.]; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1439-45 (2d ed. 1988) [hereinafter TRIBE, CONSTITUTIONAL LAW]; Joseph Tussman & Jacobus tenBroeck, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344-53 (1949).

33. See JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION—RECLAIMING THE FOURTEENTH AMENDMENT 260 (1983) [hereinafter BAER, EQUALITY]; *Mercado v. Kingsley Area Sch.*, 727 F.Supp. 335, 344 (W.D. Mich. 1989).

34. See, e.g., *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920), where the Court stated the test as, "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 415. In *New Orleans v. Dukes*, 427 U.S. 297 (1976), the Court devised a more generous formulation that a classification is justified if it is "rationally related to a legitimate state interest." *Id.* at 303. The least the Court seems to demand is:

[t]he constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some

### B. Strict Scrutiny

The famous Footnote 4 of *United States v. Carolene Products Co.* staged a new epoch. There, Justice Stone introduced his view that:

legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, [might] be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . [S]imilar considerations [may] enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities . . . prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.<sup>35</sup>

This turned out to be the beginning of the second tier of judicial review of legislative acts, the evolution of the so-called two-tier-theory<sup>36</sup> by the Warren Court.<sup>37</sup>

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inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). For an extensive covering of the different standards under the rational basis test see Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1973); Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077-87 (1969) [hereinafter Note, *Developments*].

35. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (Stone, J., concurring). For a critique of the Carolene Products theory see Lea Brilmayer, "Carolene", *Conflicts, And the Fate of the "Inside-Outsider"*, 134 U. PA. L. REV. 1291 (1986).

36. The expression was coined by Gerald Gunther, *The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 17 (1972) [hereinafter Gunther, *Evolving Doctrine*].

37. See BAER, *EQUALITY*, *supra* note 33, at 118; J. Skelly Wright, *Judicial Review and the Equal Protection Clause*, 15 HARV. C.R.-C.L. L. REV. 1 (1980); Michael W. Dowdle, Note, *The Descent of Antidiscrimination: On the Intellectual Origins of the Current Equal Protection Jurisprudence*, 66 N.Y.U. L. REV. 1165, 1198-1229 (1991).

Strict scrutiny was first applied in *Korematsu v. United States*, 323 U.S. 214 (1944), a decision reviewing legislative regulations providing for camp imprisonment of all persons of Japanese descent living on the West Coast, whether they were U.S. citizens or not, in order to counter Japanese espionage and sabotage acts appearing probable at that time. Although the Supreme Court assumed a suspect classification

Strict scrutiny is applied, first, when the legislature uses a suspect classification, i.e. a classification suggesting discriminatory intent. Second, it will be applied when fundamental rights or fundamental interests like the right to vote or the right of access to courts are impaired by the legislative act.<sup>38</sup> The latter so-called "fundamental rights branch of equal protection" was initiated in 1942 by the *Skinner v. Oklahoma ex rel Williamson* case.<sup>39</sup>

Under strict scrutiny a state or government classification will only pass, if it (1) is necessary (2) for the realization of a compelling governmental interest.<sup>40</sup> A classification is necessary, if no other means are less intrusive for the achievement of the governmental interest. Therefore, one could speak of a proportionality test, a device often used in German constitutional doctrine.<sup>41</sup>

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and applied strict scrutiny, it did not strike down the regulations at issue applying the strict preconditions for the governmental goal and the means-end-relation. National security was held to be a compelling interest of the government, and the Court was not to question the military commander's evaluation of national security needs. *Id.* at 216-23.

38. See BAER, EQUALITY, *supra* note 33, at 260-61; CRAIG R. DUCAT & HAROLD W. CHASE, CONSTITUTIONAL INTERPRETATION 68 (4th ed. 1988); TRIBE, CONSTITUTIONAL LAW, *supra* note 32, at 1454 *et seq.*; Congressional Research Service, *supra* note 30, at 1702-13; Tussman & tenBroeck, *supra* note 32, at 353-61; Comment, *Contrasting Methods*, *supra* note 31, at 535-41; Note, *Developments*, *supra* note 34, at 1087-1104 and 1120-32.

39. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). Compare also JOHN HART ELY, DEMOCRACY AND DISTRUST 245-46 n.38 (1980); Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 272-73 (1987); Tussman & tenBroeck, *supra* note 32, at 361-65.

40. See, e.g., *Shaw v. Reno*, 113 S.Ct. 2816 (1993); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 299 (1978) ("a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest"); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) ("will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy").

41. See WINFRIED BRUGGER, GRUNDRECHTE UND VERFASSUNGSGERICHTS-BARKEIT IN DEN VEREINIGTEN STAATEN VON AMERIKA [Basic Constitutional Rights and Constitutional Jurisprudence in the United States of America] 173 (1987); Ulrich Beyerlin, "Umgekehrte Rassendiskriminierung" und Gleichbehandlungsgebot in der amerikanischen Verfassungsrechtsprechung [Reverse Discrimination and Equal Treatment in U.S. Constitutional Jurisprudence], 39 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZaöRV, JOURNAL OF PUBLIC FOREIGN AND INTERNATIONAL LAW] 496, 525-26 (1979); Bungert, *supra* note 31, at 450-51 (1990). For a more detailed treatment of the proportionality standard see *infra* note 66.

There are four indicia or factors that may render a criterion of classification used by the state or federal government suspect, thus triggering strict scrutiny:

- (1) prejudice against discrete and insular minorities;<sup>42</sup>
- (2) use of irrational group stereotypes;<sup>43</sup>
- (3) stigmatization of a politically powerless segment of society; and,<sup>44</sup>
- (4) reference to an unalterable personal trait.<sup>45</sup>

Because of their character as factors or indicia, one of these factors will contribute to the suspectness of a certain criterion of differentiation, however, it will not alone decide upon the status as suspect classification. Perhaps one can state that application of strict scrutiny will be the more certain the more factors that are fulfilled.<sup>46</sup>

Rosberg argues that the relationship between two factors varying in their intensity decides the qualification of a classification as suspect: A function of the intensity of the infringement by the classification, and the integrity of the political process by which the specific classification has been chosen among others which would have had the same results.<sup>47</sup> Therefore, the more systematically a certain group is excluded from political participation, e.g., the greater the majority neglects the interests of the minority, the more likely it is that the Court would deem it a suspect classification.<sup>48</sup>

42. *Carolene Products*, 304 U.S. at 152 n.4 (Stone, J., concurring).

43. ELY, *supra* note 39, at 158-159. The notion "stereotype" is used by Justice Blackmun in his opinion in *Bakke*, 438 U.S. at 402, 405 (Blackmun, J., concurring).

44. *Bakke*, 438 U.S. at 324, 360 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part); *Brown v. Board of Ed.*, 347 U.S. 483, 493-94 (1954); Tussman & tenBroeck, *supra* note 32, at 358; Note, *Developments, supra* note 34, at 1127. Similarly Fiss, *supra* note 29, at 154-56, views the Equal Protection Clause as a protective right for minority groups and emphasizes the group criterion of a group's lack of political influence hand in hand with lengthy and simultaneous suppression, stereotyped in the Blacks.

45. ELY, *supra* note 39, at 154-55; *Bakke*, 438 U.S. at 360-61; Note, *Developments, supra* note 34, at 1126-27.

46. See BRUGGER, GRUNDRECHTE, *supra* note 41, at 202; Bungert, *supra* note 31, at 451.

47. Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 299-304; see also Note, *Developments, supra* note 34, at 1125-27.

48. Rosberg, *supra* note 47, at 301; Note, *Developments, supra* note 34, at 1125.

### C. Differences Between the Two Fundamental Tests

In looking for a reasonable governmental interest under the rational basis test, the legislative materials or the explicitly stated arguments of the respective state or federal government are of primary importance. If those are missing or insufficient, the Supreme Court will consider the implicit purpose of the respective legislative act or will apply its own reflections as to a possible justification of the act.

However, under the standards of strict scrutiny or intermediate scrutiny,<sup>49</sup> the Supreme Court does not demonstrate such generosity.<sup>50</sup> Relying on the precondition that in principle only a *de jure* discrimination, i.e. only a willful and intended discrimination activates strict scrutiny,<sup>51</sup> not every *de facto* discrimination, the Supreme Court requires proof of discriminative intent, although also admitting objective factors for the proof. If the petitioner established *prima facie* evidence of discrimination,<sup>52</sup> the burden of proof shifts to the state as the originator of the discriminatory act. The state has to prove the lack of discriminative intent, or demonstrate hypothetically that an identical substantive decision would have been made without the discriminative intent.<sup>53</sup>

When applying strict scrutiny the Supreme Court usually reaches the "verdict" of unconstitutionality of the governmental act. The application of rational basis review, by contrast, regularly turns out as a defeat for the petitioner, since in most cases a rational governmental goal can be found due to the wide formulation of the criterion of justification.<sup>54</sup> This explains the struggle for placing a certain criterion of differentiation under the strict scrutiny formula: The allocation of suspect or non-suspect status to a criterion of classification rules upon the intensity of review and consequently indirectly

49. See *infra* section D.

50. See Note, *A Dual Standard for State Discrimination Against Aliens*, 92 HARV. L. REV. 1516, 1519 (1979) [hereinafter Note, *Dual Standard*]; see also DUCAT & CHASE, *supra* note 38 at 69.

51. *Washington v. Davis*, 426 U.S. 229 (1976); see also DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT—THE SECOND CENTURY (1888-1986)* [hereinafter D.P. CURRIE, *THE SECOND CENTURY*] 488-93 (1990).

52. Although the respective decisions of the Supreme Court concerned the area of race discrimination, the holdings may possibly be extended to other suspect criteria of differentiation.

53. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). As to questions of burden of proof or burden of justification, respectively, see also John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1223-81 (1970).

54. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 552-53 (2d ed. 1991); Bungert, *supra* note 31, at 451.

upon the probability of a finding of unconstitutionality by the Supreme Court.<sup>55</sup>

#### D. Intermediate Scrutiny

More recently another level of scrutiny evolved, usually referred to as "intermediate scrutiny." It is located between the two other tests. This standard of review was first applied in *Craig v. Boren*,<sup>56</sup> a gender discrimination case. Intermediate scrutiny is used in situations of quasi-suspect classifications and when quasi-fundamental rights are infringed upon. Quasi-suspect status has been awarded to classifications on account of gender or illegitimacy. Under intermediate scrutiny a differentiating governmental act is justified if (1) it serves an important governmental objective, and (2) it is substantially related to achievement of this objective.<sup>57</sup>

As an alternative to the three tiers of review, or, more exactly, the two-tier-and-a-mezzanine-theory<sup>58</sup> a sliding scale approach has been proposed by Justice Marshall.<sup>59</sup> According to this test, there are not three fixed levels. Instead, the degree of importance of the governmental goal striven for and the intensity of the relation between means and goal is dependent upon the invidiousness of the classification established.<sup>60</sup> Thus, a sort of interest balancing comes into play, which is already applied by the courts in several areas.<sup>61</sup> However, this sliding scale approach could extinguish an important

55. See also Bungert, *supra* note 31, at 451. As to the development see also Note, *Dual Standard*, *supra* note 50, at 1519.

56. 429 U.S. 190 (1976). See Bungert, *supra* note 31, at 452-54; Comment, *Contrasting Methods*, *supra* note 31, at 541-42.

57. See *Craig*, 429 U.S. at 197. See also JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 576-79 (4th ed. 1991) [hereinafter NOWAK & ROTUNDA CONSTITUTIONAL LAW]; 2 ROTUNDA ET AL., CONSTITUTIONAL LAW, *supra* note 32, at 326-28; TRIBE, CONSTITUTIONAL LAW, *supra* note 32, at 1601-25; Comment, *Contrasting Methods*, *supra* note 31, at 541-45.

58. See BAER, EQUALITY *supra* note 33, at 264. She bases this notion on the so-called *two-tier-theory*, which refers to the traditional review on two levels and was first used by Gunther, *Evolving Doctrine*, *supra* note 36, at 17.

59. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting). See also *Dandridge v. Williams*, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting).

60. See also Comment, *Contrasting Methods*, *supra* note 31, at 545-47.

61. It is, for instance, used in determining legislative jurisdiction (jurisdiction to prescribe) according to the so-called rule of reason of the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1986), first coined in *Timberlane Lumber Co. v. Bank of Am. N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1976) [hereinafter *Timberlane I*] in the context of antitrust law. Second, under the



doctrinal difference between the Equal Protection Clause and the Due Process Clause in its variant of substantive due process.<sup>62</sup>

In this respect, it is argued that the Equal Protection Clause structurally aims at the protection of members of politically vulnerable groups against discrimination by the government, whereas substantive due process aims at protecting specific fundamental interests of the individual, not at protecting certain groups or members of groups.<sup>63</sup> This perspective seems to indicate a basic separation of equal protection rights<sup>64</sup> and substantive fundamental constitutional rights.<sup>65</sup> Some, however, argue that modern Supreme Court jurisprudence mixes the structural differences between these rights of equality and rights of liberty and thus creates, alluding to the notion of substantive due process, a sort of "substantive equal protection."<sup>66</sup>

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Due Process Clause of the Fourteenth Amendment of the U.S. Constitution, minimum contacts are required for establishing (international) jurisdiction. *See* *International Shoe v. Washington*, 326 U.S. 310, 316 (1945); *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977); *Burnham v. Superior Court of California*, 495 U.S. 604, 606 (1990); *see, e.g., LEFLAR ET AL., supra* note 11, at 49-58; *SCOLES & HAY, supra* note 11, at 78-88. For the reasonableness criterion additionally required for (international) jurisdiction, the Supreme Court has recently favored an interest balancing approach. *See* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987); *see also* *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 421 (1986); *GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 72-79 and 92-95 (2d ed. 1992); Peter Hay, *Flexibility Versus Predictability and Uniformity in Choice of Law—Reflections on Current European and United States Conflicts of Law*, 1 REC. DES COURS 281 (1991). To compare the approach of (governmental) interest analysis, *see* particularly, *DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS* 88 *et seq.* (1965); Brainerd Currie, *Comment on Babcock v. Jackson*, 63 COLUM.L.REV. 1233, 1241-43 (1963); Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958), *reprinted in* *BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS* 77 (1963); Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, *reprinted in* *CURRIE, supra* at 177.

62. *See* Comment, *Contrasting Methods*, *supra* note 31, at 547, 571-74.

63. *See* Comment, *Contrasting Methods*, *supra* note 31, at 530-31 and 573-74; Fiss, *supra* note 29, at 147-70.

64. In German constitutional doctrine: "Gleichheitsrechte."

65. In German constitutional doctrine: "Freiheitsrechte."

66. *See* Lupu, *supra* note 27, at 1000, 1031.

The distinction of different levels of scrutiny in U.S. equal protection doctrine bears strong structural parallels to the German constitutional concept of the principle of proportionality ("Verhältnismäßigkeitsgrundsatz") with its three elements of fitness ("Geeignetheit"), necessity ("Erforderlichkeit"), i.e. the measure undertaken must be

Before dwelling upon equal protection for alien and foreign corporations, i.e. alien juridical persons, current doctrine of equal protection for alien natural persons will be summarized and analyzed. This turns out to be particularly helpful, not only because equal protection for foreign or alien corporations is much less frequently discussed in U.S. court decisions and legal commentaries than equal protection for aliens, but also because important argumentative lines will be transferred. "Alienage" is commonly understood as "non-U.S.-citizenship," only referring to natural persons. Thus, it does not equal the notion of "national origin," but may intersect with it in some cases.<sup>67</sup>

### III. EQUAL PROTECTION OF ALIEN NATURAL PERSONS

In regard to equal protection of alien natural persons, classifications of the states and of the Federal government have to be distinguished.

#### A. *Discrimination by the States*

##### 1. The Pre-Burger Court

The jurisprudence of the pre-Burger Court does not reflect a consistent line on the question of equal protection of aliens. No specific standard of constitutional review evolved.<sup>68</sup> In *Ohio ex rel. Clarke v. Deckebach*, for instance, a city of Cincinnati ordinance which excluded aliens from licenses for operating billiard halls was held constitutional. The possibility of a rational basis for the legislature's evaluation that experiences with and interests of particular members of the class disqualify the class as a whole from

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the least restrictive means, and appropriateness ("Angemessenheit"). For an English description see Matthias Herdegen, *The Relation Between the Principles of Equality and Proportionality*, 22 COMMON MARKET L. REV. 683 (1985). See also Bungert, *supra* note 31, at 464-65; David P. Currie, *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 1989 SUP. CT. REV. 333, 353-54.

67. See *TRIBE*, CONSTITUTIONAL LAW, *supra* note 32, at 1544 n.2. Classifications on the basis of national origin are, however, considered as the prototype of a suspect classification triggering off strict scrutiny, as is the criterion of race. See *Hernandez v. Texas*, 347 U.S. 475 (1954) and *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

68. See *ROTUNDA ET AL.*, CONSTITUTIONAL LAW, *supra* note 32, at 478, 481-84; Earl M. Maltz, *The Burger Court and Alienage Classification*, 31 OKLA. L. REV. 671, 671-74 (1978). As to the work restrictions for aliens held to be constitutional, see Note, *Constitutionality of Restrictions on Aliens' Right to Work*, 57 COLUM. L. REV. 1012 (1957).

operating a potentially harmful business could not be waived away.<sup>69</sup> On the other hand, in *Truax v. Raich*<sup>70</sup> and in *Takahashi v. Fish & Game Commission*,<sup>71</sup> the Court established that a state regulation depriving aliens of the possibility of earning their living by completely denying a work permit, or issuing it merely under absolute restrictions, violates the Equal Protection Clause. The restriction would in essence establish a denial of residence permit. The residence permit, however, the Court argued, was already issued by the government. In this line of thought the Supreme Court relied heavily on Congress' power to regulate immigration and naturalization, the so-called plenary power,<sup>72</sup> which would be circumvented by permitting a discrimination by the states.<sup>73</sup> Thus, equal protection doctrine was linked to the notion of preemption as used in the Interstate Commerce Clause doctrine.<sup>74</sup>

## 2. The Burger Court

In its well-known 1971 decision, *Graham v. Richardson*,<sup>75</sup> the Burger Court<sup>76</sup> placed the question of equal protection of aliens into the modern structure of two-tier equal protection analysis. This case challenged the constitutionality of Arizona and Pennsylvania statutes which denied resident

69. *Ohio ex rel. Clarke v. Deckerbach*, 274 U.S. 392, 397 (1927); see also *Terrace v. Thompson*, 263 U.S. 197 (1923).

70. 239 U.S. 33 (1915).

71. 334 U.S. 410 (1948).

72. Compare Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) [hereinafter Motomura, *Century*]. Despite Congress's power in this field, state regulations are permitted if they do not stand in conflict with federal legislation. See *Zschernig v. Miller*, 389 U.S. 429, 441 (1968); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 722 reporters' note 2 (1986). State regulation of aliens in conflict with federal law is inapplicable due to the Supremacy Clause, U.S. CONST. art. VI, cl. 2; see *Takahashi*, 334 U.S. at 419; *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941). Not only federal laws, but also regulation of aliens in provisions of international treaties of the government preside; see *id.*; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 722 reporters' note 9 (1986).

73. *Takahashi*, 334 U.S. at 418-19; *Truax*, 239 U.S. at 42. For a comment see Rosberg, *supra* note 47, at 295-97.

74. Compare David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069, 1072 (1979) [hereinafter Note, *Equal Treatment*]. For an extensive treatment of the preemption question under the Commerce Clause see TRIBE, CONSTITUTIONAL LAW, *supra* note 32, at 479-501.

75. 403 U.S. 365 (1971).

76. For details see the analysis by Maltz, *supra* note 68, at 671.

aliens participation in a state-financed welfare program.<sup>77</sup> In his opinion, Justice Blackmun repeated that the Equal Protection Clause of the Fourteenth Amendment is not only applicable to citizens, but to all persons.<sup>78</sup> Justice Blackmun argued that aliens are prototypes of a "discrete and insular minority" in the understanding of Footnote 4 of *United States v. Carolene Products Co.*,<sup>79</sup> i.e. an inherently suspect classification triggering strict scrutiny. Accordingly, the challenged regulations could only be upheld if they were necessary to achieve a compelling state interest.<sup>80</sup> The Court rejected the states' argument: The special public interest in preferred treatment of their own state citizens over aliens when allocating rare resources. For once, the underlying special public interest doctrine had become inapplicable with the abandonment of the right/privilege distinction<sup>81</sup>—a privilege as a voluntary grant of benefits of the government had been held revocable and, in particular, could be made dependent on nationality—due to the close fusing of the two categories in modern legislation.<sup>82</sup> Second, the Court held that fiscal considerations do not establish a compelling state interest.<sup>83</sup>

Commentators emphasize that in the specific situation of *Graham v. Richardson* it was superfluous to award alienage the status of a suspect classification, because the case could have been argued—as the Supreme Court admitted itself<sup>84</sup>—under the preemption doctrine as well, as the earlier decision of *Takahashi v. Fish & Game Commission*<sup>85</sup> had been.<sup>86</sup>

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77. *Graham*, 403 U.S. at 366-68, 371.

78. *Id.* at 371. See *Truax*, 239 U.S. at 39; *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

79. See *supra* part II.B.

80. *Graham*, 403 U.S. at 371-72.

81. In the areas of public service and of governmental granting of goods and services, individual "rights," (which stem from constitutional law or from common law and may only be restricted in a limited sense) were distinguished from "privileges," (which were granted by the government and thus could be revoked at its discretion). See TRIBE, CONSTITUTIONAL LAW, *supra* note 32, at 680-82.

82. *Graham*, 403 U.S. at 374. In *Takahashi*, 334 U.S. at 420-21, the special public interest doctrine received a blow in the context of discriminations against aliens. As to the development, see William W. van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, particularly at 1454-57 (1968); Steven F. Dobson, Comment, *Constitutional Protection of Aliens*, 40 TENN. L. REV. 235, 236-37 (1973) [hereinafter Comment, *Protection of Aliens*].

83. *Graham*, 403 U.S. at 374-75. This had been already held in *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

84. *Graham*, 403 U.S. at 380-83. In *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973), the Supreme Court for the first time based the application of strict scrutiny exclusively on the categorization of "alienage" as a suspect distinction.

85. 334 U.S. 410, 418-19 (1948). See also *supra* part III.A.1.

Granting suspect classification status to classifications on account of nationality had to be considered a great victory.<sup>87</sup> Since under strict scrutiny, hardly any discriminatory legislative act can withstand; in the following years almost every state regulation challenged for different treatment of aliens was invalidated by the Court.<sup>88</sup> Strict scrutiny was applied, for instance, to state regulations distinguishing on grounds of nationality concerning employment for simple tasks in civil service,<sup>89</sup> admission to the bar,<sup>90</sup> permits for practice as a civil engineer,<sup>91</sup> and financial subsidies in the area of university education.<sup>92</sup>

### 3. Reasons for Applying Strict Scrutiny

If one analyzes the criterion "alienage" under the four definitional factors for a suspect classification laid out previously,<sup>93</sup> several arguments can be made.

It is doubtful whether alienage can be viewed as an "unalterable trait" (factor 4) like race or national origin. Although in principle nationality is acquired automatically by birth in the first place, U.S. citizenship may be achieved by aliens, certain difficulties pending,<sup>94</sup> so that the nationality of a person is not unalterable, but dependent upon the person's will in coordinance with certain other factors.<sup>95</sup>

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86. See, e.g., the argument made in Note, *Equal Treatment*, *supra* note 74, at 1072-73.

87. Rosberg, *supra* note 47, at 298 n.95, notes that, interestingly enough, the California Supreme Court anticipated this development two years earlier in *Purdy & Fitzpatrick v. State*, 456 P.2d 645 (Cal. 1969). For an assessment of *Graham v. Richardson*, compare Stephen F. Dobson Comment, *Protection of Aliens*, *supra* note 82, at 241-44; D. P. CURRIE, *THE SECOND CENTURY*, *supra* note 51, at 500-01.

88. See also Rosberg, *supra* note 47, at 275-76.

89. *Sugarman v. Dougall*, 413 U.S. 634 (1973).

90. *In re Griffiths*, 413 U.S. 717 (1973).

91. *Examining Bd. of Engineers v. Flores de Otero*, 426 U.S. 572 (1976).

92. *Nyquist v. Mauclet*, 432 U.S. 1 (1977). Similar questions were posed in *Toll v. Moreno*, 458 U.S. 1 (1982) (nonimmigrant aliens are treated unequally as to tuition at state universities).

93. See *supra* part II.B.

94. See generally Motomura, *Century*, *supra* note 72.

95. Compare *TRIBE, CONSTITUTIONAL LAW*, *supra* note 32, at 1545; Rosberg, *supra* note 47, at 301-02. But see Note, *Dual Standard*, *supra* note 50, at 1525, arguing that due to the five year U.S. residence requirement (8 U.S.C. § 1427 (1993 Supp.)) for awarding U.S. citizenship, alienage is a trait the individual, at least temporarily, has no influence upon.

Factor 1, prejudice against an identifiable and discrete minority, on the other hand, holds true for the group of aliens. Aliens are easily distinguished from U.S. citizens. They form, despite their differing origin, a relatively homogenous group. They present a small minority. This evaluation holds particularly true for nonresident aliens. Aliens as a class of persons suffered from prejudices and disadvantages in the past, have been victims of discrimination and, therefore, lived through a history of prejudice, particularly because of their insufficient command of the English language and their differing customs and traditions.<sup>96</sup>

Furthermore, it is persuasively argued that the factor of stigmatization (factor 3) is fulfilled, since the classification of citizens and aliens bears connotations of the popular and official perception that aliens are inferior in certain aspects.<sup>97</sup> Similarly, one could find the use of an irrational group stereotype (factor 2) in different treatment on grounds of "alienage." *Rosberg*, particularly, points to the possibility of characterizing a classification based on alienage as suspect because of the lack of political influence of the aliens.<sup>98</sup>

Taking these factors into account, it is consistent for commentators to emphasize that discrimination against aliens, at least against resident aliens, should always be reviewed under strict scrutiny.<sup>99</sup> Some, however, oppose an unrestricted application of strict scrutiny.<sup>100</sup> They fear that suspect and quasi-suspect classifications would overflow all boundaries, and eventually courts would be forced to reevaluate reasonable decisions of the legislature in numerous areas of law. Differentiations according to IQ or physical

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The weight of this frequently made argument is elucidated by the facts of *Ambach v. Nowick*, 441 U.S. 68 (1979), where the alien petitioners explicitly had refused to apply for U.S. citizenship, although they personally fulfilled all preconditions, so that they themselves prevented the alteration of the trait.

96. See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976); *TRIBE*, *CONSTITUTIONAL LAW*, *supra* note 32, at 1545-46; *Rosberg*, *supra* note 47, at 306; Note, *Dual Standard*, *supra* note 50, at 1525-26.

97. *Rosberg*, *supra* note 47, at 303; Note, *Dual Standard*, *supra* note 50, at 1516.

98. *Rosberg*, *supra* note 47, at 304-05. This corresponds with his concept outlined previously, that the suspectness is construed as a function of "intensity of the impairment provoked by the discrimination" and "intensity of the powerlessness in the political participation process, which led to this discrimination," see *supra* text accompanying note 47.

99. See, e.g., *Rosberg*, *supra* note 47, at 299-315. John E. Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071, 1099 and *passim* (1974), however, argues for an intermediate standard.

100. See Note, *Dual Standard*, *supra* note 50, at 1526-28. See also Archibald Cox, *The Supreme Court 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

numerous areas of law. Differentiations according to IQ or physical disabilities, for example, could also be qualified as suspect classifications, since they also are stigmatizing and unalterable traits.<sup>101</sup> Therefore, several prefer to maintain a dual standard in the area of differentiations between aliens and citizens. The rational basis test is proposed, (1) if the justification for strict scrutiny would be circular, i.e., if it is the very goal of differentiation which is used for the suspect classification for applying strict scrutiny review;<sup>102</sup> (2) if the Constitution itself justifies the practice challenged, e.g. denial of suffrage to aliens; or (3) if aliens may evade the impairments of the regulation without any difficulties.<sup>103</sup>

On the other hand, the application of strict scrutiny for differentiations on account of nationality was completely rejected. Justice Rehnquist had already refused to classify nationality as a suspect criterion in his dissent in *Sugarman v. Dougall*<sup>104</sup> not only, because he saw no indications that aliens could be regarded as a discrete and insular minority. Alienage could not be considered as a suspect criterion, he said, because the Constitution itself already contained no fewer than eleven provisions that distinguish between citizens and aliens.<sup>105</sup> Finally the validity of the starting point that infringement upon a discrete and insular minority automatically indicates a suspect classification is put into question, because it originates, as previously mentioned, from Footnote 4 of *Carolene Products*.<sup>106</sup>

#### 4. The Political Function Exemption From the Strict Scrutiny Test

The standard of review of *Graham v. Richardson* does not apply to all state acts. In the situation of state acts that concern the political representation of the people of the state, differentiations between state citizens and aliens will only be reviewed under the rational basis test.<sup>107</sup> As very often happens

101. Note, *Dual Standard*, *supra* note 50, at 526-27.

102. See also the formulation in *TRIBE, CONSTITUTIONAL LAW*, *supra* note 32, at 1545 ("[A]t least if it is alien disenfranchisement that is being challenged, it would seem oddly circular to rely on the very practice challenged to establish the propriety of so strictly scrutinizing it as to make very probable its invalidation.").

103. See Note, *Dual Standard*, *supra* note 50, at 1523-31 and 1537.

104. 413 U.S. 634 (1973).

105. *Id.* at 649-57 (Rehnquist, J., dissenting).

106. Justice Frankfurter put it precisely and to the point: "A footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine. . ." *Kovacs v. Cooper*, 336 U.S. 77, 90-91 (1949).

107. See *Foley v. Connelie*, 435 U.S. 291, 296 (1978) and John A. Ragosta, *Aliens Abroad: Principles for the Application of Constitutional Limitations to Federal*

under the rational basis standard of review, state legislation was upheld, for example, for regulations excluding aliens from the right to vote,<sup>108</sup> from the eligibility as jurors,<sup>109</sup> from occupation as teachers in public schools,<sup>110</sup> or occupation as probation officers.<sup>111</sup> *Bernal v. Fainter*<sup>112</sup> fits into this context, where the Court unanimously held the citizenship requirement for notaries public unconstitutional, because they do not exert public functions.

This dual standard for discrimination against aliens was initiated in *Sugarman v. Dougall*.<sup>113</sup> The atypical decision<sup>114</sup> considered a blank exclusion of aliens from all employment in New York public service to violate the Equal Protection Clause, but noted that the power to pass laws necessary to preserve the basic conception of a political community is still attributed to the states.<sup>115</sup> Later this exemption from strict scrutiny for state regulations which distinguish on account of alienage was called the "political function exception."<sup>116</sup> Under close consideration two types of provisions fall into this exception category: (1) participation in the administration of political autonomy of the state and (2) filling positions in public service of a certain degree of political importance.

*Foley v. Connellie*, which applied the rational basis test to employment of state troopers,<sup>117</sup> is seen as going too far. It is argued that policemen are

*Action*, 17 N.Y.U. J. INT'L L. & POL. 287, 296 (1985).

108. *Foley*, 435 U.S. at 295-96; *Sugarman*, 413 at 648; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 722 reporter's note 7 (1986); Ragosta, *supra* note 107, at 296. As to the lack of an express guaranty of the active and passive right to vote for aliens in the U.S. Constitution see U.S. CONST. art. I, § 2, para. 2; § 3 para. 3; art. II, § 1, para. 5; amend. XV, § 1.

109. *Perkins v. Smith*, 370 F. Supp. 134 (D. Md. 1974); *aff'd summarily* 426 U.S. 913 (1976).

110. *Ambach v. Norwick*, 441 U.S. 68 (1979); *discussed in Note, Equal Treatment, supra* note 74, at 1077-79.

111. *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982). See also decisions cited in RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 722 reporter's note 5 (1986).

112. 467 U.S. 216 (1984).

113. 413 U.S. 634 (1973).

114. Not typical, because the Court held the discriminatory provision unconstitutional by applying strict scrutiny, although one could have argued convincingly that the filling of public offices was at stake, which should trigger rational basis review, and under that standard, the provision could have passed.

115. *Sugarman*, 413 U.S. at 647.

116. NOWAK & ROTUNDA, CONSTITUTIONAL LAW, *supra* note 57, at 709-132; ROTUNDA ET AL., CONSTITUTIONAL LAW, *supra* note 32, at 487. See also the wording in *Cabell*, 454 U.S. at 437-39.

117. *Foley*, 435 U.S. at 295 *commented upon in Note, Equal Treatment, supra* note 74, at 1076-77.



not elected into office and do not decide policy issues. Therefore, there should not have been room for the political function exception, but strict scrutiny should have been applied.<sup>118</sup>

The political function exemption has often been criticized. It is particularly pointed to a specific lack of consistency.<sup>119</sup> The exclusion of a certain class, whether or not it is a suspect class, from the right to vote requires that this discrimination is necessary for achieving a compelling state goal, because strict scrutiny is applicable, the right to vote is considered a fundamental right. Similarly, the use of nationality as a criterion of distinction triggers strict scrutiny, even if no fundamental right is concerned, since alienage is a suspect classification. Despite this, merely weak rational basis review is applied for constitutional review of a regulation which excludes aliens from the right to vote, a regulation cumulating two of the criteria triggering strict scrutiny.<sup>120</sup>

### 5. The Illegal Aliens Exemption From the Strict Scrutiny Test

The Supreme Court seems to make yet another exemption from the strict scrutiny test. *Toll v. Moreno* and *Elkins v. Moreno* held that for illegal aliens and nonimmigrant aliens—unlike the situation of resident aliens, which were concerned in the cases discussed *supra*, Part III.A.2-4, strict scrutiny does not kick in, but rather a weaker standard of review does. It is, however, unclear whether the Court simply referred to the rational basis test, or whether a new area for intermediate scrutiny crystalizes.<sup>121</sup>

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118. Note, *Dual Standard*, *supra* note 50, at 1533.

119. See Maltz, *supra* note 68, at 680.

120. *Skaft v. Rorex*, 553 P.2d 830 (Colo. 1976); *appeal dismissed* for want of substantial federal question, 430 U.S. 961 (1977).

121. See *Toll v. Moreno*, 458 U.S. 1 (1982), and also *De Canas v. Bica*, 424 U.S. 351 (1976) (illegal aliens); *Elkins v. Moreno*, 435 U.S. 647 (1978) (nonimmigrant aliens). These cases seem to apply a kind of rational basis test. See also the comment in Note, *Equal Treatment*, *supra* note 74, at 1080-84. On the other hand, the highly debated case of *Plyler v. Doe*, 457 U.S. 202 (1982), held that a state may not withdraw financial subsidies for school attendance of illegal aliens. Here, something close to strict scrutiny was used. However, the decision was special in that it concerned education which is considered a quasi-fundamental right or interest by the Supreme Court and thus suggests applying strict scrutiny. For a comment on this hybrid decision see D. P. CURRIE, *THE SECOND CENTURY*, *supra* note 51, at 504; TRIBE, *CONSTITUTIONAL LAW*, *supra* note 32, at 1551-53; Dennis Y. Hutchinson, *More Substantive Equal Protection? A Note on Plyler v. Doe*, 1982 SUP. CT. REV. 167. For the complete problem see NOWAK & ROTUNDA, *CONSTITUTIONAL LAW*, *supra* note 57, at 716-182; ROTUNDA ET AL., *CONSTITUTIONAL LAW*, *supra* note 32, at 497-500.

To sum up, it is established that discriminatory state regulations towards natural alien persons basically have to withstand strict scrutiny review. If these provisions concern political functions in the states or restrictions for illegal aliens or nonimmigrant aliens, a weaker constitutional review is applied, probably rational basis review.<sup>122</sup>

## *B. Discrimination by the Federal Government*

### 1. The Doctrine of the Supreme Court

After *Graham v. Richardson*,<sup>123</sup> the answer to the question whether federal legislation classifying on grounds of nationality would also be viewed as inherently suspect and, thus, had to pass strict scrutiny was awaited with suspense. Two features distinguish federal laws from state laws in the area of alien legislation. First, in federal law, there is a tremendous number of provisions that differentiate between citizens and aliens.<sup>124</sup> Second, the federal government was seen as having unrestricted powers for the control of admission and expulsion of aliens as well as for regulations of the residence of aliens.<sup>125</sup> As previously noted,<sup>126</sup> for review of federal legislative acts the content of the Equal Protection Clause has been read into the Due Process Clause of the Fifth Amendment in its branch of substantive due process, which is necessitated, because the Fourteenth Amendment is addressed solely to the states. There are no differences as to the substance.

In *Hampton v. Mow Sun Wong* the Supreme Court stated that for acts of the federal government in the District of Columbia or on insular possessions the Due Process Clause has the same significance as the Equal Protection

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122. See also Note, *Equal Treatment*, *supra* note 74, at 1075.

123. 403 U.S. 365 (1971).

124. In the annex to its brief in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), the U.S. Government lined up 243 federal provisions from 31 different titles of the United States Code which distinguish citizens and resident aliens, *Brief for the Petitioner*, Appendix S. 1a - 25a. Additionally, there is Title 8 U.S.C. (Aliens and Nationality) where almost every provision treats aliens differently.

125. See Rosberg, *supra* note 47, at 276, and T. ALEXANDER ALENIKOFF, *Foreign Affairs and the U.S. Constitution*, FEDERAL REGULATION OF ALIENS AND THE CONSTITUTION 157-166 (Louis Henkin et al. eds., 1990). For the constitutional entrenchment of immigration law, particularly under the perspective of developing procedural due process, which by now tends to protect material legal positions in immigration law, see Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992).

126. *Supra* part II (initial paragraph).

Clause,<sup>127</sup> but it refused to exactly pin down the standard of review. On the other hand, the Court said that a discrimination of aliens by the federal government may be justified by a special national interest.<sup>128</sup> The Court reviewed the case as a procedural due process problem and not as an equal protection case.<sup>129</sup>

In *Mathews v. Diaz* decided on the same day, Congress was granted a wide discretion for the question whether particular government benefits granted to citizens were to be extended to aliens.<sup>130</sup> The essential question of the case was, however, whether a differential treatment of different classes of aliens is permissible, or whether all aliens had to be treated as a group prohibiting different treatment within classes of aliens.<sup>131</sup> The Court noted that under equal protection analysis very different considerations are necessary for reviewing federal action as opposed to state action.<sup>132</sup> Ultimately, the decision has to be regarded as a denial of strict scrutiny for federal acts.<sup>133</sup> *Hampton v. Mow Sun Wong* already emphasized that the Fifth and the Fourteenth Amendment not only differ in wording, but also that particularly under the Fifth Amendment predominant national interests have to be respected as a justification, which cannot be put forward in the context of state legislation.<sup>134</sup>

The dichotomy of review standards between state and federal legislation becomes clear in *Nyquist v. Mauclet*.<sup>135</sup> There, the Court expressly points out that only classifying state provisions for natural persons will be reviewed

127. *Hampton*, 426 U.S. at 100.

128. *Id.* at 100-101. For a case analysis see Maltz, *supra* note 68, at 681-85.

129. See Maltz, *supra* note 68, at 683-84. See also the dissenting opinion of Justice Rehnquist, who accuses the Court of intermingling the concepts of procedural due process and substantive due process, *Hampton*, 426 U.S. at 119-20 (Rehnquist, J., dissenting).

130. *Mathews v. Diaz*, 426 U.S. 67 (1976). At least it is certain, as Rosberg, *supra* note 47, at 283, correctly points out, that a congruent differentiating state statute could not have been upheld under then applicable strict scrutiny under the Fourteenth Amendment. For a comment on the case see Note, *Equal Treatment*, *supra* note 74, at 1085-86.

131. *Mathews*, 426 U.S. at 80-85; see also Maltz, *supra* note 68, at 684-85.

132. *Mathews*, 426 U.S. at 84-85.

133. 3 SAMUEL R. BERGER & MARK S. MCCONNELL, LIMITATIONS IMPOSED BY THE CONSTITUTION AND TREATIES OF THE UNITED STATES ON THE REGULATION OF FOREIGN INVESTMENT IN MANUAL OF FOREIGN INVESTMENT IN THE UNITED STATES 11 (J. Eugene Marans et al., eds., 1984 & Supp.); Maltz, *supra* note 68, at 685.

134. *Hampton*, 426 U.S. at 100. See also Karst, *supra* note 27, at 553-60.

135. 432 U.S. 1 (1977).

under strict scrutiny, whereas for federal legislation rational basis review applies.<sup>136</sup>

## 2. Different Concepts

According to Maltz,<sup>137</sup> the Supreme Court applies three different standards for reviewing the constitutionality of federal acts, which are dependent upon the nature of the discriminatory act and the federal branch involved. If the act is applied only to a restricted territory, such as the District of Columbia or an insular possession, and cumulatively no special national interest is concerned, strict scrutiny will be used.<sup>138</sup> If the discrimination is in effect on the complete U.S. territory and results from the actions of an administrative agency, middle level scrutiny is applied: The government carries the burden of proof that the discrimination is justified by rational considerations which keep within the power of the respective agency.<sup>139</sup> If, finally, the differing treatment is in effect in the whole U.S. and results from an act of Congress, a sort of rational basis test is used: It is not enough for the petitioner to proffer an alternate way of fulfilling the standard chosen by Congress. The Supreme Court will not compare the relative reasonableness of the standards but will leave Congress' decision unhampered as long as the differentiation is not unreasonable.<sup>140</sup> This differentiated categorization of the Court's jurisprudence on federal classifications seems too daring in its present shape. The theoretical basis is rather thin: Maltz builds his differentiated view merely on the three cases cited as examples.

## 3. Critique

a. If one compares the preconditions asked of federal legislation relying upon alienage with the preconditions asked of state legislation, the system seems to be inconsistent.<sup>141</sup> Why should aliens present a discrete and insular minority on the state level, but not on the federal level? Even the fact that discrimination of aliens is widely spread on the federal level, cannot count as a justification. Such practice must either cause that on the state level also merely ordinary rational basis review is applied homogeneously, or one must keep to the general principle that a uniform violation of provisions cannot flip

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136. *Id.* at 7. See also BERGER & MCCONNELL, *supra* note 133, at 11.

137. See Maltz, *supra* note 68, at 685.

138. See, e.g., *Examining Bd. of Engineers v. Flores de Otero*, 426 U.S. 572 (1976).

139. The prototype case is *Hampton*, 426 U.S. at 103.

140. For an example see *Mathews v. Diaz*, 426 U.S. 67 (1976).

141. See also Maltz, *supra* note 68, at 685-86.

the sides of legality and illegality. Furthermore, it seems inappropriate to draw conclusions from lower-ranking statutory law to constitutional law, a methodology which is the core of the line of those arguments. This would reverse the hierarchical order foreseen in the Constitution.

Considerations of distribution of powers between the nation as a whole, i.e., the federation, and the member states, on which the special treatment of acts of Congress and federal government is founded, ultimately stem doctrinally from a different level than the notion of equal protection and should not be intermingled. Leaving aside the consideration of distribution of power, no phenomenological or constitutional reason is left why aliens, or differentiations based upon alienage, should or could be treated differently on federal and state level.

Therefore, it appears persuasive to follow the proposal to apply intermediate scrutiny for all classifications on grounds of nationality or alienage.<sup>142</sup> This would lead to consistency of the different lines of precedents and would comply with the importance of the criterion of nationality, besides its greater practicability and clarity.

b. The discussion on the intensity of constitutional review for classifications based upon alienage has presented in a microcosm what has been intensely debated in U.S. constitutional doctrine during the last twenty years as to the question of differentiations under the Equal Protection Clause as a whole: The black-and-white painting of two extreme tiers of constitutional review, which either amount to a very intensive or to a very lax control, is no longer able to correspond to the complexity of legislative differentiations. Therefore, the necessity of a three-tier-model is generally acknowledged.<sup>143</sup> For the formulation of the third tier, which is designed to form a sort of intermediate level, diverse proposals have been made that cannot all be described within the precise boundaries of this Article.

Only in passing, a model proposed by Nowak shall be noted that was carved out for classifications on account of alienage. Nowak suggests to distinguish (1) suspect-prohibited classifications, (2) neutral classifications, and (3) permissive classifications. When coming across a suspect-prohibited classification, particularly a classification based on race, the Supreme Court

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142. See, e.g., 2 ROTUNDA ET AL., CONSTITUTIONAL LAW, *supra* note 32, at 496; Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 61 GEO. L.J. 1071, 1099 *passim* (1974).

143. See, for some examples out of a multitude, particularly Nowak, *supra* note 142 at 1092-97; Gunther, *Evolving Doctrine*, *supra* note 36, at 18-24; Note, *Developments*, *supra* note 34, at 1076-1132. See also Fiss, *supra* note 29, at 147-77; Tussman & tenBroek, *supra* note 32, at 343-80.

should void the legislative act, if the legislator cannot prove that the regulation is necessary for the achievement of a compelling governmental interest. Such a justification should be almost impossible. Consequently, this type of classification is referred to as a "prohibited classification." A classification is considered neutral, if it uses a factor or status inherent in human nature, with the exception of race, or restricts the exertion of a fundamental right of a class of persons. Such a classification can only be upheld if it bears an actually demonstrable rational relation to a legitimate governmental interest. All remaining classifications are considered "permissive." Permissive classifications are constitutional as long as there is a conceivable basis for them, a so-called conceivable basis standard, under which the classification could stand in a rational relation to a governmental interest.<sup>144</sup> Here, the Court will not review the actual basis of the goal pursued by the legislator or the means used.<sup>145</sup> Nowak wants to fit "alienage" into his system as a neutral classification, since discrimination against aliens runs counter to the constitutional principle to attribute burdens according to individual responsibility or wrongdoing.<sup>146</sup> Consequently, the intermediate level of review, the so-called demonstrable basis standard, applies.<sup>147</sup>

#### IV. EQUAL PROTECTION FOR ALIEN AND FOREIGN CORPORATIONS<sup>148</sup>

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144. As examples for this group, Nowak puts forward *Jefferson v. Hackney*, 406 U.S. 535, 546-47, 549 (1972) and *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

145. For a comprehensive treatment see Nowak, *supra* note 142, at 1092-94.

146. See the formulation in *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) ("legal burdens shall bear some relationship to individual responsibility or wrongdoing").

147. Nowak, *supra* note 142, at 1099.

148. State equal treatment clauses may be divided into general and specific (i.e. those specifically referring to corporations) equal treatment clauses.

Specific state equal treatment clauses of constitutional rank include IDAHO CONST. art. XI § 10 (Michie 1992) which states:

"[N]o company or corporation formed under the laws of any other country, state, or territory, shall have or be allowed to exercise or enjoy, within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of this state;"

OKLA. CONST. art. IX, § 44 (1991) which reads:

"No foreign corporation shall be authorized to carry on in this State any business which a domestic corporation is prohibited from doing, or be relieved from compliance with any of the requirements made of a similar corporation by the Constitution or laws of the State. Nothing in this article, however, shall restrict or limit the power of the Legislature

to impose conditions under which foreign corporations may be licensed to do business in this State;"

and UTAH CONST. art. XII, § 6 (1992) which formulates it in a negative manner:

"No corporation organized outside of this State, shall be allowed to transact business within the State, on conditions more favorable than those prescribed by law to similar corporations, organized under the laws of this State."

According to 1992 Utah Laws S.J.R. 7, § 6, however, after completion of a referendum repeal of the provision is intended. Thus far, such a referendum has yet to occur.

See also the somewhat more neutrally worded IOWA CONST. art. I, § 22 (1991): "Foreigners who are, or may hereafter become residents of this state, shall enjoy the same rights in respect to the possession, enjoyment and descent of property as native born citizens."

These clauses, in principle, not only refer to out-of-state (foreign) corporations, but also to out-of-country (alien) corporations. A large-scale examination of the standard of review used under these state equal treatment clauses exceeds the boundaries of this article. However, it should be emphasized that the mere formulation of these provisions elucidates that primarily a protectionist perspective predominates. Domestic corporations are sought to be protected against the situation that foreign and alien corporations are or will be granted more rights and, generally speaking, a more advantageous competitive standing. See, e.g., IDAHO CONST. art. XI, § 10 (Michie 1992); *American Sur. Co. v. Blake*, 261 P. 239, 240 (Idaho 1927).

Consequently, these state constitutional specific equal treatment clauses aim at prevention of discrimination of nationals. Supposedly, a standard of review comparable to the rational basis test predominates. However, in *Weems v. Bruce*, 66 F.2d 304 (10th Cir. 1933), the equal treatment clause of the Oklahoma Constitution was held violated, but there were no delineations as to the intensity of the standard of review. Michigan courts follow the requirements for strict scrutiny established in *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), requiring a suspect classification or potential impairment of fundamental rights under the equal protection clause of the Michigan Constitution. *Mercado v. Kingsley Area Sch.*, 727 F. Supp. 335, 345 (W.D. Mich. 1989); *Palmer v. Bloomfield Hills Bd. of Ed.*, 417 N.W.2d 505, 506-07 (Mich.Ct.App. 1987).

The same should hold true for the general equal treatment clauses of state constitutions. As to the general equal protection clause of the California Constitution, however, it is assumed that a broader view is taken than under the equal protection clause of the federal Constitution. But this statement is based upon the fact that suspect classifications generally are more easily accepted in California, particularly gender and homosexuality. See, e.g., Paul L. Hoffman, *The Application of International Human Rights Law in State Courts: A View From California*, 18 INT'L LAW. 61, 63 (1984) citing cases. An extensive study points out that in most states in the area of business law a stricter standard of review is used under the general state equal protection clause than under the U.S. Constitution. See Comment, *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324,

In discussing the protection of alien and foreign corporations under the Equal Protection Clause of the U.S. Constitution two structural levels have to be distinguished:<sup>149</sup> On the primary level one has to decide whether U.S. constitutional law is applicable at all, an approach which has always to be taken when contacts to foreign states or countries are involved in the constellation under review.<sup>150</sup> Inclining to the notion of "conflict of laws," this level could be called "conflict of constitutional laws."<sup>151</sup> Admittedly, however, currently the term "conflict" seems only usable in a restricted reading. The most common situations will be that of a "false conflict" in its narrow sense, or that of a disinterested forum, as the (governmental) interest analysis<sup>152</sup> calls it. This indicates that either the national constitutional law wants to be applied and there is no "conflict" with another country's constitutional law or the national constitutional law declares itself inapplicable, due to sufficient national contacts or due to the lacking of a protective interest, so that the national judge lacks an applicable provision for his decision.<sup>153</sup> On the secondary level, the level of national constitutional law, after establishing the applicability of the Equal Protection Clause to foreign and alien corporations, one has to ask which standard of equal protection review should be applied to foreign or alien corporations (Parts B-C).

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1472-78 and 1465-72 (1982). Finally, it has to be pointed out that the specific state equal treatment clauses for corporations only assume applicability for the respective intrastate commerce.

On the other hand, constitutional and statutory equal treatment clauses may be distinguished. *See also* the lists of "pure equal treatment provisions" and "substantial equal treatment provisions" in Comment, *The Status of Foreign Corporations: Effects Given "Equal Treatment" Statutes*, 1961 DUKE L.J. 274, 277 n.17 [hereinafter Comment, *Equal Treatment Statutes*]. It has, however, to be kept in mind that in states without express equal treatment provisions in statutory or constitutional law equal treatment may be practiced on grounds of *comity*. As to the statutory state equal treatment clauses *see also* Elvin R. Latty, *Pseudo-Foreign Corporations*, 65 YALE L.J. 137, 156-58 (1956).

149. These two levels certainly have to be distinguished for alien natural persons too, but have not been treated at that point in this article for lack of space.

150. *See infra* part A.

151. A part of this approach is the question of extraterritorial application of the Constitution, *see, e.g.*, Roszell D. Hunter, IV, Comment, *The Extraterritorial Application of the Constitution—Unalienable Rights?*, 72 VA. L. REV. 649 (1986).

152. *See* the citations in note 65 *supra*.

153. This complex of "conflict of constitutional laws" cannot be dealt with in adequate length in this article. It will be dealt with in another project of the author's, and has been treated in German by the author in BUNGERT, ALIEN CORPORATIONS, *supra* note 23, chapters 6-8.



## A. Applicability of the Equal Protection Clause to Foreign and Alien Corporations on a Conflict of Constitutional Laws Level

### 1. First Step: Overcoming the "Artificial Person" Doctrine

The early Supreme Court cases were based on the "artificial person" doctrine established by Chief Justice Marshall in *Trustees of Dartmouth College v. Woodward*,<sup>154</sup> which defined corporations as artificial beings created by the state by means of granting a privilege and confined to the competences granted in the charter.<sup>155</sup> Thus, the early federal cases held "equal protection of the laws" due to its clear wording to be restricted to persons that were born or naturalized or endowed with life and liberty, i.e., clearly only natural persons.<sup>156</sup> Several Supreme Court cases avoided the question.<sup>157</sup>

In the *Railroad Tax Cases*,<sup>158</sup> the Circuit Court held that private corporations could invoke the Equal Protection Clause: "It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation."<sup>159</sup>

Justice Field formulated that "the courts will look through the ideal entity and name of the corporation to the persons who compose it, and protect them, though the process be in its name."<sup>160</sup> According to this "Field

154. "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

155. See Blumberg, *Corporate Personality in American Law*, 38 AM. J. COMP. L. SUPPL. 49 (1990); Horwitz, *Santa Clara*, *supra* note 2; for a historical overview of the different concepts see Machen, *supra* note 2, at 253 (I) and 347 (II).

156. *Insurance Co. v. New Orleans*, 13 F.Cas. 67, 68 (No. 7052) (C.C.D. La. 1870) (Woods, C.J.).

157. *Richmond R.R. v. City of Richmond*, 96 U.S. 521 (1877); *Peik v. Chicago & Northwestern R.R.*, 94 U.S. 164 (1876); *Chicago, Burlington & Quincy R.R. v. Iowa*, 94 U.S. 155 (1876).

158. 13 F. 722 (C.C.D. Cal. 1882), *appeal dismissed as moot*, *San Mateo County v. Southern Pac. R.R.*, 116 U.S. 138 (1885).

159. *Railroad Tax Cases*, 13 F. at 744. See also Charles R. O'Kelley Jr., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation after First National Bank v. Bellotti*, 67 GEO. L.J. 1347, 1353-56 (1979); Comment, *Personification*, *supra* note 2, at 1460.

160. *Railroad Tax Cases*, 13 F. at 748.

rationale," also called "partnership theory of the corporation,"<sup>161</sup> the rights of the corporation must be congruent to the rights the shareholders would have, if they had chosen an unincorporated form of enterprise.<sup>162</sup> Then, in *Santa Clara County v. Southern Pacific Railroad*,<sup>163</sup> Chief Justice Waite stated that all the Justices had no doubt that the Equal Protection Clause is applicable to corporations and thus would not discuss the question.<sup>164</sup> The Court later confirmed this holding several times.<sup>165</sup>

## 2. Applying Equal Protection to Foreign and Alien Corporations

After applying equal protection to corporations at all, the breakthrough for the question of applying the Equal Protection Clause to foreign corporations came with *Pembina Mining Company v. Pennsylvania*.<sup>166</sup> According to this decision and the authorities thereafter, the notion of "person" in the Equal Protection Clause of the Fourteenth Amendment not only refers to

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161. Comment, *Personification*, *supra* note 2, at 1455 *et seq.*

162. O'Kelley, *supra* note 159, at 1356.

163. 118 U.S. 394 (1886).

164. *Id.* at 396. As to the holding of that case compare JOHN J. FLYNN, *The Jurisprudence of Corporate Personhood: The Misuse of a Legal Concept, in CORPORATIONS AND SOCIETY—POWER AND RESPONSIBILITY* 131, 133-46 (Warren J. Samuels & Arthur S. Miller, eds. 1987); Horwitz, *Santa Clara*, *supra* note 2, at 13, 16-18; Congressional Research Service, *supra* note 30, at 1695-96; HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW 1836-1937*, at 43-46 (1991); *see also* *Southern Ry. v. Greene*, 216 U.S. 400 (1910).

165. *Liggett Co. v. Lee*, 288 U.S. 517, 536 (1933); *Gulf, Colo. & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 154 (1897); *Pembina Mining Co. v. Pennsylvania*, 125 U.S. 181, 188-89 (1888). This concept was widely applauded in commentary literature, *see* Louis B. Boudin, *Truth and Fiction about the Fourteenth Amendment*, 16 N.Y.U. L.Q. REV. 19 (1938); Brainerd Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1, 4 (1960); Howard J. Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371 (1938) and 48 YALE L.J. 171 (1939); Clarence E. Martin, *Is a Corporation a "Person?"*, 44 W. VA. L. REV. 247 (1938); Neuman, *supra* note 39, at 271; Orvill C. Snyder, *The Corporate Person and the Fourteenth Amendment*, 8 BROOKLYN L. REV. 4 (1939); Robert P. Griffin, Comment, *Artificial "Persons" and the Fourteenth Amendment*, 48 MICH. L. REV. 983 (1950); Willard Hurst, *Book Review of Graham and Boudin*, 52 HARV. L. REV. 851 (1939). Most of those law review articles are reactions to a dissent by Justice Black in *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 83, 85-86 (1938), arguing the Supreme Court's precedents were unfounded and wrong and corporations were not to be protected by the Equal Protection Clause.

166. 125 U.S. 181, 188 (1888).

citizens, but also to aliens and alien juridical persons, i.e. corporations.<sup>167</sup> But alien companies are awarded only rights that corresponding domestic company forms may invoke.<sup>168</sup> The range of (international) application of the Equal Protection Clause was characterized by the formula: "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; . . . ."<sup>169</sup>

### 3. Interpretation of "Within its Jurisdiction"

The clause "within its jurisdiction" contained in the Equal Protection Clause is a point of great ambivalence and debate.<sup>170</sup> Emphasizing the wording and the original designation of the constitutional provision for natural persons one is inclined to think of a physical presence within the territorial boundaries of the state. Justice Field in *Pembina Mining Company v. Pennsylvania*, for instance, understood the notion of a "person within the jurisdiction" as a "person owning property within the jurisdiction."<sup>171</sup>

This interpretation appears too narrow. Relying on the then dominant theory of the corporation, which considered the corporation a mere creature of (local) law<sup>172</sup> having no legal entity status beyond the territorial boundaries of its incorporation state,<sup>173</sup> this interpretation would completely

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167. See JOSEPH HENRY BEALE, THE LAW OF FOREIGN CORPORATIONS AND TAXATION OF CORPORATIONS BOTH FOREIGN AND DOMESTIC 175-77 (1904) [hereinafter BEALE, FOREIGN CORPORATIONS]; GERALD CARL HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW—A CONTRIBUTION TO THE HISTORY AND THEORY OF JURISTIC PERSONS IN ANGLO-AMERICAN LAW 149 (1918) [hereinafter HENDERSON, FOREIGN CORPORATIONS]; JOHN BOUVIER, LAW DICTIONARY I, "equal protection of the laws" at 1047 (3d ed. 1914); B. Currie & Schreter, *supra* note 164, at 3; see also *Blake v. McClung*, 172 U.S. 239, 260 (1898); *Philadelphia Fire Ass'n v. New York*, 119 U.S. 110, 117-18 (1886).

168. *Pembina Mining*, 125 U.S. at 189.

169. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

170. See, e.g., 36 AM. JUR. 2D *Foreign Corporations* § 46 (1968 & 1993 Supp.).

171. *Pembina Mining*, 125 U.S. at 188.

172. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 587 (1839).

173. *Id.* at 588. *Bank of Augusta* also held that foreign corporations according to comity had to be principally recognized in the other state, but even that does not help to do away with the restriction of "within its jurisdiction." *Id.* For the definition of "comity" see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 101 cmt. e and § 403 cmt. a (1986). The first definition of comity was established in *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895):

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But

exclude foreign corporations from the protection of the Equal Protection Clause, because corporations could never be physically present.<sup>174</sup> Consequently, some commentators hold the Equal Protection Clause applicable to foreign corporations, if they are licensed to do business in the individual state, at least in regard to those activities that do not concern the right of the corporation to continue doing business in the state.<sup>175</sup> This concept builds upon the understanding that only a foreign corporation that commenced to do business within the state was subjected to its jurisdiction, since only this doing business established a connection to the courts of the state. All other corporations were seen not to be "within the jurisdiction" of the state and could not ask for equal treatment.<sup>176</sup> From that understanding it is no big step to the view that only foreign corporations admitted to doing business within the state were protected by the Equal Protection Clause, since according to the law of all states, admission ("qualification") is a precondition for "doing business" within the state.<sup>177</sup> From this concept it further follows that by issuing admission certificates with a certain time limit, the state may reserve a periodical influence on the foreign corporation, because at every extension of the admission it may impose new conditions.<sup>178</sup>

The treatment of this question is not extensive in the U.S. literature. Usually, it is argued, an additional precondition for applying the Equal Protection Clause to foreign corporations is that they are subject to the jurisdiction of the state in which they asked for equal treatment with domestic corporations.<sup>179</sup> The scarce treatment of the jurisdiction formula stems in part from the fact that many situations before the Supreme Court concerned natural persons. In these cases, the Court simply applies the Privileges and

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it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.

174. See also B. Currie & Schreter, *supra* note 165, at 5.

175. See *id.* at 5-6; 36 AM. JUR. 2D *Foreign Corporations* § 46 (1968 & 1993 Supp.).

176. See Congressional Research Service, *supra* note 30, at 1696 (citing *Blake v. McClung*, 172 U.S. 239, 260-61 (1898)). See also BEALE, *FOREIGN CORPORATIONS*, *supra* note 167, at 175-76.

177. See *infra* part IV.C.3.a.

178. *Fire Ass'n of Philadelphia v. New York*, 119 U.S. 110 (1886); see also BEALE, *FOREIGN CORPORATIONS*, *supra* note 167, at 176.

179. See *WHYY v. Glassboro*, 393 U.S. 117 (1968); *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494 (1926); *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1886). All the cases concerned out-of-state corporations. See also EDWARD S. CORWIN ET AL., *THE CONSTITUTION AND WHAT IT MEANS TODAY* 415 (13th ed. 1973).

Immunities Clause, which guarantees equal treatment for "citizens" of sister states and does not contain the restrictive textual clause of "within its jurisdiction," thus rendering the question of "extraterritorial" application of the Equal Protection Clause negligible. Furthermore, the Due Process Clause comprised by the same Amendment as the Equal Protection Clause does not contain the formula.<sup>180</sup> The interpretation of the within the jurisdiction-formula, therefore, is only relevant for foreign (and alien) corporations, for which the Privileges and Immunities Clause is not applicable.<sup>181</sup>

In *Blake v. McClung*,<sup>182</sup> Justice Harlan made clear, without prejudicing the entire meaning of the "within its jurisdiction" formula, that in any case corporations not incorporated in the state in question nor having taken up doing business there, were not in its jurisdiction according to the meaning of Fourteenth Amendment.<sup>183</sup> On the one hand, it is not persuasive to rely on an incorporation in the respective state, as Justice Harlan seems to require, for in that case the corporation is no longer foreign, but domestic. On the other hand, as B. Currie & Schreter point out, Justice Harlan's interpretation reads the clause as "within the jurisdiction of its courts."<sup>184</sup> This reading, however, appears unnecessarily and arbitrarily narrow. Particularly if one reflects on another statement of the Court that the Equal Protection Clause is addressed to all three branches of government, i.e. executive, legislative and judicial branch,<sup>185</sup> it seems too narrow to view "jurisdiction" simply as

180. See also B. Currie & Schreter, *supra* note 165, at 6.

181. See *Western & S. Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 656 (1981); *Hemphill v. Orloff*, 277 U.S. 537, 548-50 (1928); *Orient Ins. Co. v. Daggs*, 172 U.S. 557, 561 (1899); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 181 (1869); *Bank of Augusta*, 38 U.S. (13 Pet.) at 586-87; BEALE, FOREIGN CORPORATIONS, *supra* note 167, at 174-75; RICHARD M. BUXBAUM & KLAUS J. HOPT, LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE—CORPORATE AND CAPITAL MARKET LAW HARMONIZATION POLICY IN EUROPE AND THE U.S.A. [Integration through Law Vol. 4] 36-38 (1988); HENN & ALEXANDER, *supra* note 10, at 170; ROTUNDA ET AL., CONSTITUTIONAL LAW, *supra* note 32, at 649-50; 18A FLETCHER CYC. CORP. § 8850 (1987); Frederick Green, *Corporations as Persons, Citizens, and Possessors of Liberty*, 94 U. PA. L. REV. 202, 228-33 (1946); R. Paul Holland, *Should a Corporation be Considered a Citizen Under the Privileges and Immunities Clause of the Federal Constitution?*, 36 W. VA. L. Q. 245 (I) and 330 (II) (1930); Comment, *Equal Treatment Statutes*, *supra* note 148, at 275.

182. 172 U.S. 239 (1898).

183. *Id.* at 260-61. See *Fire Ass'n of Philadelphia*, 119 U.S. at 122-23 (Harlan, J., dissenting).

184. B. Currie & Schreter, *supra* note 165, at 7; see also John B. Sholley, *Corporate Taxpayers and the Equal Protection Clause*, 31 ILL. L. REV. 463, 477-78 (1937).

185. *Blake*, 172 U.S. at 260.

"judicial jurisdiction." On the contrary, a reading as "legislative jurisdiction" (or "prescriptive jurisdiction") suggests itself,<sup>186</sup> i.e. as the jurisdiction or power of the state (not only the state legislature, as the wording of the term might suggest) to make applicable its laws to certain constellations with contacts to other states.<sup>187</sup>

#### 4. Approaching a Subjection Factor?

*Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*<sup>188</sup> took an extensive reading of the "within its jurisdiction" formula. This decision held that Wisconsin's dismissal of a the well-founded claim of a foreign corporation because the foreign corporation bringing action did not transport persons and voluminous documents situated in its home state to the forum for evidentiary hearings, violated the Equal Protection Clause. Although the foreign corporation had no business contacts to the forum, it was made to transport voluminous documents to the forum state, although the evidence could have been taken in the home state by a commissioned judge, etc. For domestic corporations or natural persons, Wisconsin did not have similar provisions.

Some commentators take the view that since *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*<sup>189</sup> the Supreme Court assumes the requirement of "within its jurisdiction," at least for all business transactions the corporation is permitted to carry out in the state, and for all assets the corporation has rightfully acquired in the state.<sup>190</sup> It is pointed out, however, that in both situations the consent of the state is required.<sup>191</sup> Nowak & Rotunda and Scoles & Hay, however, interpret this decision—probably correctly—much more comprehensively, in the sense that the Supreme Court sees the clause of "within its jurisdiction" now already fulfilled, when the foreign corporation is not yet admitted in the state and did

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186. See also B. Currie & Schreter, *supra* note 165, at 7-8.

187. For the distinction of "judicial jurisdiction" and "legislative jurisdiction" see, e.g., BORN & WESTIN, *supra* note 61, at 541-42; William L. M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401 (1986) ("make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court.").

188. 262 U.S. 544 (1923).

189. 262 U.S. 544 (1923).

190. *Id.* at 550; see also Sholley, *supra* note 184, at 480-81; 16A AM. JUR. 2D *Constitutional Law* § 745 (1979 & 1993 Supp.).

191. See Sholley, *supra* note 184, at 481.

not yet appoint a registered agent. Simply the act of bringing suit in the state, they argue, already opens up the applicatory range of the Equal Protection Clause. Also, every person directly impaired by a state statute, they claim, is empowered to challenge the Equal Protection Clause. Consequently, they hold the Equal Protection Clause applicable to each person seeking redress in a state court.<sup>192</sup> This would constitute a subjection factor approach.<sup>193</sup>

### 5. Constitutional Right to be Admitted to do Business?

Consistently, the next question is whether a foreign corporation may also invoke the Equal Protection Clause, if it is not admitted to doing business, and, particularly, if it precisely asks for admission or wants to challenge a denial of admission.

In this context, the "doctrine of conditional consent" or the "doctrine of conditional entry"<sup>194</sup> dominated initially. According to this doctrine, the admission of the foreign corporation to doing instate business could be conditioned upon the consent to being bound by certain state provisions.<sup>195</sup> Before the enactment of the Fourteenth Amendment, Justice Field had, in *Paul v. Virginia*,<sup>196</sup> held the state to possess the power to differentiate between domestic and foreign corporations and, in particular, to determine whether and under which conditions to admit foreign corporations.<sup>197</sup> Still in 1906, even after the enactment of the Fourteenth Amendment, the Supreme Court held that a state may refuse to admit a foreign or alien corporation to doing business according to its discretion or referring to a rationale contrary to the

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192. NOWAK & ROTUNDA, CONSTITUTIONAL LAW, *supra* note 57, at 338; SCOLES & HAY, *supra* note 11, at 108. This concept can be backed by the dissenting opinion of Justices Brandeis and Holmes in *Kentucky Finance*, 262 U.S. at 552-53, in which they allude to this indirect overruling of *Blake v. McClung* and refuse it explicitly.

193. Elsewhere I have deduced and comprehensively discussed this approach, particularly for German conflict of constitutional laws. See BUNGERT, ALIEN CORPORATIONS, *supra* note 23, Chapter 7 *et passim*.

194. See Sholley, *supra* note 184, at 481-98; Stanley M. Klem, Comment, *Qualification Requirements for Foreign Corporations: The Need for a New Definition of "Doing Business" Based on In-State Sales Volume*, 14 U. MICH. J.L. REF. 86, 98 (1981) [hereinafter Comment, *Qualification Requirements*]; .

195. See Kaplan, *Foreign Corporations and Local Corporate Policy*, 21 VAND. L. REV. 433, 445 (1968).

196. 75 U.S. (8 Wall.) 168 (1868).

197. *Paul*, 75 U.S. at 181; see also *Ducat v. Chicago*, 77 U.S. 410, 415 (1870). Also compare HENDERSON, FOREIGN CORPORATIONS, *supra* note 167, at 48-49 and 101-11; Sholley, *supra* note 184, at 463; see also Comment, *Qualification Requirements*, *supra* note 194, at 97-98; Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1605-06 (1960).

general purpose of the Constitution. A state was said to be able to admit a corporation under conditions leading to a discrimination between domestic and foreign corporations, and even to a discrimination between corporations of different states. After admission under restrictive conditions, a state could alter or enhance these conditions.<sup>198</sup> In particular, a state could admit a foreign corporation for a limited period of time, whereby the corporation after expiration of the time limit automatically was no longer "within its jurisdiction," so that the state was not bound in any way to renew the admission.<sup>199</sup> Due to the argumentative figure of "the greater includes the less" the state was permitted to exert its power to exclude the foreign corporation completely from doing business within the state, merely partly exclude the corporation, or admit the corporation to do business while imposing conditions.<sup>200</sup>

In a series of decisions from 1910 onwards, the Supreme Court imposed significant qualifying restrictions to this state power of exclusion and expulsion, which put an end to the extreme protectionism reigning before:<sup>201</sup> The admission of foreign or alien corporations may no longer be made dependent upon "unconstitutional conditions."<sup>202</sup> Particularly, in *Blake v. McClung*<sup>203</sup> the state was held to have the power to impose foreign corporations conditions for admission to doing business within the state, but these conditions may not conflict with the privileges and immunities guaranteed to citizens or protected by the Constitution.<sup>204</sup> However, the literature views

198. *National Council of U.A.M. v. State Council of Virginia*, 203 U.S. 151 (1906). See also BEALE, FOREIGN CORPORATIONS, *supra* note 167, at 156-59; HENDERSON, FOREIGN CORPORATIONS, *supra* note 167, at 110-11; Kaplan, *supra* note 192, at 443-45; Comment, *Equal Treatment Statutes*, *supra* note 148, at 276. See also *Horn Silver Mining Co. v. New York*, 143 U.S. 305, 315 (1891) ("Having the absolute power of excluding the foreign corporation the State may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient.").

199. See also Sholley, *supra* note 184, at 483.

200. See Kaplan, *supra* note 195, at 443-44; 19 C.J.S. *Corporations* § 898 (1990).

201. For a comprehensive account of the Supreme Court jurisprudence compare Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935).

202. See HENDERSON, FOREIGN CORPORATIONS, *supra* note 167, at 111 and 134-47; Comment, *Equal Treatment Statutes*, *supra* note 148, at 276-77. Compare also Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1989); Hale, *supra* note 201, at 321; Van Alstyne, *supra* note 86, at 1439; Note, *Unconstitutional Conditions*, *supra* note 197; 19 C.J.S. *Corporations* § 898 (1990).

203. 172 U.S. 239 (1898).

204. *Id.* See also BEALE, FOREIGN CORPORATIONS, *supra* note 167, at 167-69.



the occasional statements of the Supreme Court, usually in form of dicta, as if the power of the state to exclude foreign and alien corporations from doing business in the state is still nearly unlimited.<sup>205</sup>

Furthermore, due to the prerogatives of the Commerce Clause, states cannot deny admission to doing business to those foreign corporations which seek activities in interstate commerce.<sup>206</sup> These prerogatives of foreign and interstate commerce must be transferred to alien corporations as well, i.e., corporations from other countries may also not be denied admission to interstate commerce. This can be concluded from two points. First, the emphasis of the clause does not lie on the actor in commercial transactions, i.e. out-of-state corporation or out-of-country corporations, but on the underlying commerce protected: The interstate commerce is to be kept free of discriminations.<sup>207</sup> Second, the non-discrimination part of the Commerce Clause already according to its wording is not only directed against state discriminations of interstate commerce, although this is certainly its main direction, but also against state discriminations of commerce with foreign nations ("foreign commerce").<sup>208</sup>

According to Supreme Court jurisprudence, a constitutional right of foreign or alien corporations to be admitted to doing business in the state still cannot be deduced from the Equal Protection Clause.<sup>209</sup> But some critical voices have been raised. On the one hand, some call the doctrine of

205. See Kaplan, *supra* note 195, at 444.

206. See *Union Pac. R.R. v. Public Serv. Comm'n*, 248 U.S. 67 (1918); Note, *Unconstitutional Conditions*, *supra* note 197, at 1606-07.

207. See particularly, the famous wording in *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979):

The few simple words of the Commerce Clause . . . reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

208. See *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1 (1986); *South Central Timber Developmental, Inc. v. Wunnicke*, 467 U.S. 82, 88 (1984); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 170 (1983); *Japan Line, Ltd. v. City of Los Angeles*, 441 U.S. 434 (1979); *Crutcher v. Kentucky*, 141 U.S. 47, 61 (1891); *Campeau Corp. v. Federated Dep't Stores*, 679 F.Supp. 735 (S.D. Ohio 1988).

209. See, particularly, *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494, 510 (1926). See also Harold Wright Holt, *Full Faith and Credit—A Suggested Approach to the Problem of Recognition of Foreign Corporations*, 89 U. PA. L. REV. 453, 464 (1941); Note, *Unconstitutional Conditions*, *supra* note 197, at 1608-09; 36 AM. JUR. 2D *Foreign Corporations* § 46 (1968 & 1993 Supp.).

conditional entry an anachronism. This doctrine alone is not considered sufficient to justify state restrictions for foreign corporations.<sup>210</sup> On the other hand, it was attempted to deduct a constitutional right to admission from other constitutional provisions. Holt proposes to find a way via the Full Faith and Credit Clause of Art. IV Sec. 1 of the U.S. Constitution. This provision is only applicable for foreign corporations, because it is only applied in the relation between the states. It is seen to require from the sister state the recognition and enforcement of those parts of the corporate law of the other state that regulate the legal relations of members of the corporation incorporated under that law towards third persons. The state is perceived to be allowed to take measures against individuals to retrain them from acting for the corporation in the territory of the state, only if the state can put forward a sufficiently strong governmental interest for that step.<sup>211</sup>

Neither courts nor authors discuss a corresponding restriction of the applicability of the Equal Protection Clause (on the conflict of constitutional laws level) for federal classifications. One might conclude that no corresponding restrictions exist from this lack of discussion, and also particularly, because in relation to the federal government the wording of the Due Process Clause of the Fifth Amendment, which the Equal Protection Clause<sup>212</sup> is read into, does not contain a "within its jurisdiction" formula.

### *B. Equal Protection Standard of Review Currently Used*

#### 1. Traditional Jurisprudence of the Supreme Court

Whereas the alienage classification is often discussed in jurisprudence and law literature, hardly any statement on the differentiating criterion of foreign or alien corporate nationality is to be encountered. A review of Supreme Court cases that apply the Equal Protection Clause to alien or foreign corporations evidences constant use of the weakest standard of review, the rational basis test. Interestingly enough, as far as I can see, the nationality of corporations has never been discussed under the perspective of suspect or quasi-suspect criteria of classification in legal literature or court decisions. Particularly, none of the cases discussed the question of intensity of constitutional review methodologically in an extensive way. This situation differs strangely from gender classifications, for example.<sup>213</sup> This may be so,

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210. See, e.g., Comment, *Qualification Requirements*, *supra* note 194, at 98.

211. Holt, *supra* note 209, at 464-65 and 479-80. See also Note, *Unconstitutional Conditions*, *supra* note 197, at 1609.

212. See *supra* part II (initial paragraph).

213. Compare, e.g., NOWAK & ROTUNDA, *CONSTITUTIONAL LAW*, *supra* note 57, at 733-52; Bungert, *supra* note 31, at 450-54.

because corporate alienage does not stand out as a ready criterion of classification, as a legal quality, in opposition to, for instance, gender.

In *G.D.Searle & Co. v. Cohn*,<sup>214</sup> for example, a New Jersey tolling statute for foreign corporations which were not represented in New Jersey by a registered agent was upheld under the Equal Protection Clause. Explicitly, merely rational basis review was applied. On the one hand, limitation of actions was not considered a fundamental right triggering strict scrutiny.<sup>215</sup> On the other hand, it is explicitly emphasized that distinctions between domestic and foreign corporations do not present suspect classifications, so that rational basis review has to be used.<sup>216</sup> In doing so, the petitioner's argument was left aside that a foreign corporation, especially if appointing an agent of service was not necessary,<sup>217</sup> is left "without a voice" in the forum state,<sup>218</sup> an argument leading to Ely's theory of a lack of democratic representation. Finally, it was argued, a mere rational basis review is predicated for a differentiation between unrepresented foreign corporations and represented foreign corporations, that is corporations with a registered agent in the forum state and those without.<sup>219</sup> In his dissent Justice Stevens points out that even under the applicable rational basis test not every distinction between domestic and foreign or alien corporations can be held constitutional, so that the means of differentiation "nationality" cannot be deemed to be a rational goal of differentiation itself.<sup>220</sup> A similar statute of Ohio was held unconstitutional a few years later in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*,<sup>221</sup> however, for violating the Interstate Commerce Clause. In this context, the revealing phrase was that "state interests that are legitimate for equal protection or due process purposes may be insufficient to withstand Commerce Clause scrutiny."<sup>222</sup> It follows, therefore, that the rational basis

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214. 455 U.S. 404 (1982).

215. See also *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 893 (1988); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 315 (1945).

216. *Searle*, 455 U.S. at 408-10; see also *Bendix Autolite*, 486 U.S. at 893-94.

217. Particularly, if the threshold of doing business is not achieved yet.

218. *Searle*, 455 U.S. at 408-09.

219. This was only deemed worthy to be mentioned in a footnote, *Id.* at 409 n.6.

220. *Id.* at 420. He formulates: "[I]n my view the Constitution requires a rational basis for the special burden imposed on the disfavored class as well as a reason for treating that class differently." *Id.* See furthermore, Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984), who proves the inadmissibility of such "naked preferences" under the several provisions of the U.S. Constitution protecting against discrimination.

221. 486 U.S. 888 (1988).

222. *Id.* at 894.

test under the Equal Protection Clause is weaker than the review of classifications under the Commerce Clause.

In the well-known case of *Western & Southern Life Insurance Co. v. State Board of Equalization of California*,<sup>223</sup> the rational basis test was cemented for a differentiation between domestic and foreign corporations in the area of state tax law. According to that decision, a differentiating or discriminatory taxation is constitutional, if it stands in a rational relation to a legitimate state interest as the goal striven for by the classification.<sup>224</sup>

## 2. Supreme Court on the Way Towards a Slight Tightening of the Standard of Review?

In recent years, however, a slight tightening of equal protection review for state classifications between foreign and domestic corporations may be noticed in Supreme Court jurisprudence. Even if the rational basis test still serves as the starting point, on close inspection there seems to be a tendency toward an intermediate scrutiny standard: In *Metropolitan Life Insurance Co. v. Ward*,<sup>225</sup> where a discriminatory state tax statute for foreign insurance companies was at stake, the Supreme Court held, in a majority opinion, that the strife for improving the local economy alone at the expense of foreign corporations does not present a legitimate state interest under the rational basis test.<sup>226</sup> Here, the Equal Protection Clause receives more bite than usual, despite the application of the weak rational basis test, because it is the main goal striven for by the discriminatory state legislation that is prohibited.<sup>227</sup> It remains questionable whether the Supreme Court would want to transfer this line of argument to alien corporations also, or would restrict it to foreign corporations. The particularly close relationship between the sister states could speak against this transfer.

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223. 451 U.S. 648 (1981).

224. *Id.* at 668. Other examples for application of the rational basis test for discrimination on grounds of corporate nationality are *Burlington N. R.R. v. Ford*, 112 S.Ct. 2184 (1992); *Amerada Hess Corp. v. New Jersey Dep't of Treasury*, 490 U.S. 66, 79-80 (1989); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 527 (1959); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 572-74 (1949).

225. 470 U.S. 869 (1985).

226. *Id.* 876-79. Cf. also 2 ROTUNDA ET AL., CONSTITUTIONAL LAW, *supra* note 32, at 337-38; Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 269 (1992).

227. See also *Is the Rationality Test Changing?* in NOWAK & ROTUNDA, CONSTITUTIONAL LAW, *supra* note 57, at 587; Laycock, *supra* note 226, at 269.

### 3. Different Concepts in Constitutional Doctrine

Law review articles also predominantly suggest the rational basis test for reviewing differentiations between foreign and domestic corporations.<sup>228</sup> B. Currie & Schreter call the rational basis test a "principle of reasonable classification" in this context and explicitly want to apply it to foreign corporations qualified to do business in the state.<sup>229</sup> Alien corporations, therefore, are left without any arguments—in the few statements in law review literature—put into the same position as the merely weakly protected nonresident aliens.<sup>230</sup> In this context, it is pointed out that the application of the Equal Protection Clause of the Fourteenth Amendment does not mean that a statute may not impose special obligations upon a foreign corporation, but simply that these obligations must stand in a reasonable relation to the fact that corporations are involved as well as to the nature of the respective branch of business. Even within corporations, a classifying statute is permitted, for instance, between the different branches of business or on account of the different size of enterprises. This is particularly feasible in tax legislation.<sup>231</sup>

In the following Part, this Article will discuss the question of applicable constitutional review anew. It will forward the proposition that for differentiations between domestic and foreign corporations a more intense level of scrutiny than the simple rational basis test should be applied. It remains questionable whether one has to differentiate between foreign and alien corporations insofar as to which level of scrutiny has to be applied. Additionally, it could turn out necessary to differentiate between federal and state classifications as done in the field of alien natural persons, although ultimately this results in a mix-up of questions of jurisdiction and basic constitutional fundamental rights questions. Restrictive regulations for foreign and alien corporations are probably predominantly those of the states. A difference as to natural persons is that for corporations there is no comparable U.S. citizenship, but only state "citizenships."

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228. See Mark E. Kruse, Comment, *California's Statutory Attempt to Regulate Foreign Corporations: Will it Survive the Commerce Clause?*, 16 SAN DIEGO L. REV. 943, 961-63 (1979) [hereinafter Comment, *California's Statutory Attempt*]. See also Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 454-55 (1982) for nonresidency and out-of-state citizenship.

229. B. Currie & Schreter, *supra* note 165, at 5-6. In the sense of something like the rational basis test, LEFLAR ET AL., *supra* note 11, at 713, speak of "a sensible basis for classification."

230. See Fred L. Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621, 644 (1976).

231. See CORWIN ET AL., *supra* note 179, at 415-16. For cases see, e.g., *Morey v. Doud*, 354 U.S. 457, 464-66 (1957).

### *C. Strict Scrutiny for Discrimination Against Alien Corporations?*

At first sight differentiations between foreign and domestic corporations seem to take place in the field of commercial law in its widest sense. This would strongly indicate applicability of the simple rational basis test which, as pointed out *supra*,<sup>232</sup> is predominant in the area of commercial and social legislation.

There are two ways to argue persuasively for the application of strict scrutiny for discriminations against foreign or alien corporations. Either one must, by way of the four indicators (topoi) laid out previously,<sup>233</sup> reach the conclusion that foreign and alien corporate nationality is a suspect classification like race, national origin and alienage, or at least a quasi-suspect one like gender or illegitimacy.<sup>234</sup> Or one must conclude that statutory (commercial) legislation of foreign and alien corporations touches in its substance upon some fundamental right. In this argumentative line, it might be necessary for consistency to determine, as a first step, whether foreign corporations may invoke the respective fundamental rights, or whether they may do so indirectly via the Equal Protection Clause. On the other hand, the fundamental rights solution might be a step-by-step approach, since here the specific legal topic and areas of law touched upon might be essential, so that universally valid statements could not be made. Thus Neuman, for instance, argues that territorial discriminations, *i.e.*, geographically defined classifications, are not to be considered as per se suspect, but should only be subjected to strict scrutiny, if the specific classifying statute touches upon a fundamental right.<sup>235</sup>

#### *1. Corporate Nationality as Suspect Classification?*

To begin with, the four factors for suspect classifications shall be examined as to the use of foreign and alien corporate nationality as the criterion of differentiation.

##### *a. Prejudice Against a Discrete and Insular Minority*

It is somewhat doubtful whether the factor of prejudice against a discrete and insular minority originating from the famous footnote 4 of *Carolene Products* (factor 1) is fulfilled by the connecting factor of foreign and alien corporate nationality. Certainly, foreign and alien corporations are easily to

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232. See *supra* part II.A.

233. See *supra* part II.B.

234. The allocation of these two criteria of differentiation is debated.

235. Neuman, *supra* note 39.

be distinguished ("discrete") from domestic corporations, using the place of incorporation rule. This rule is heavily used in different fields of the U.S. legal system.<sup>236</sup> Whether there is a minority might already be doubtful. At least, foreign corporations in the sense of out-of-state corporations are not an obvious minority in relation to domestic corporations in most states. Particularly in the U.S., it is most common to merely incorporate in one state and do business predominantly in one or several other states. In order to establish a minority proportion, it might be necessary to concentrate on the individual case or the individual state and its economic statistical data, respectively. In Delaware, for instance, the most popular state of incorporation, there should be a strong predominance of foreign corporations as opposed to domestic corporations. As to alien corporations, there should always be a minority relationship, for the activities of those corporations should in every state only amount to a small fraction in relation to domestic or at least to U.S. corporations.

It is doubtful, furthermore, whether there is prejudice. Certainly, prejudice against alien (foreign) corporations is not as intense as it has been against the Afro-Americans, the prototypical suspect criterion. However, considering the obviously protectionistic policy in some states reflected in verbal statements and often in discriminatory and restrictive statutes,<sup>237</sup> and particularly in the frequency of the use of the control theory,<sup>238</sup> a

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236. See, e.g., *Liverpool Ins. Co. v. Mass.* 77 U.S. (10 Wall.) 556 (1871); *McDermott Inc. V. Lewis* 531 A.2d 206 (Del. Super. Ct. 1987); SCOLES & HAY, *supra* note 11, at 913-14, 918-20.

237. See the examples discussed *infra* at part IX.A-B.

238. According to the control theory the nationality of a corporation is determined by the citizenship of the natural persons in control. Significantly enough, this theory originated in the so-called enemy state legislation. It is debated what percentage of participatory holdings establish control (51%, 66%, 75%) and whether one has to look to the nationality of the incorporators, of the shareholders or of the managers. See Hadari, *supra* note 5, at 23-25; Kronstein, *supra* note 5; Vagts, *supra* note 6, at 1544-51; Van Hecke, *supra* note 5, at 230-33; Williams & Chrussachi, *supra* note 5, at 339-42. From the perspective of international law, see Lucius C. Cafilisch, *Protection of Corporate Investments Abroad in the Light of the Barcelona Traction Case*, 31 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [JOURNAL OF FOREIGN PUBLIC AND INTERNATIONAL LAW; ZaöRV] 162 (1971). For the theory of control as to the multinational enterprise compare RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 414(2) (1986); Stanley J. Marcuss, *Jurisdiction with Respect to Foreign Branches and Subsidiaries: Judicial Power in the Foreign Affairs Context Under Section 414 of the Foreign Relations Restatement*, 26 INT'L LAW. 1 (1992); see also William Laurence Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Fruehauf v. Massardy*, 83 HARV. L. REV. 579 (1970);

surprisingly deep distrust of and strife for delimitation from alien corporations is found. This is also evidenced by the great number of state and federal restrictions for alien corporations.<sup>239</sup> The relative "invidiousness" also results from the quasi-arbitrary aggravation or slackening of economic regulation of foreign or alien investment and corporations depending on the country's development of internal and external trade.

### *b. History of Discrimination*

A suspect classification is assumed particularly, if there is a lengthy history of discrimination the respective (societal) group looks back to. In the literature, this question, as far as can be seen, is hardly discussed for the criterion of foreign and alien corporate nationality. A student note argues that the open door policy of the U.S. government towards alien investment in the past years does not present a history of discrimination versus alien corporations, so that application of strict scrutiny was not justified.<sup>240</sup>

This assessment, however, appears unjustifiably optimistic and euphemistic. It was not before the end of World War II and only under the auspices of the United Nations that the international co-operation and the relaxation of restrictions on foreign trade was intensified, certain first signs in the times of the League of Nations notwithstanding. However, even after

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Konrad Ginther, *Nationality of Corporations*, 16 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT [AUSTRIAN JOURNAL OF PUBLIC LAW; ÖZÖFFR] 27, 47-55 (1966).

239. See, e.g., BUNGERT, ALIEN CORPORATIONS, *supra* note 23, chapter 4; EDWARD M. GRAHAM & PAUL R. KRUGMAN, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES (1989); Harvey E. Bale, *The U.S. Federal Government's Policy Towards Foreign Direct Investment*, in REGULATION OF FOREIGN DIRECT INVESTMENT IN CANADA AND UNITED STATES 29 (Earl H. Fry & Lee H. Radebaugh eds., 1983); Herbert Brownell, *Foreign Investment in the United States Should Not Be Restricted*, in CURRENT LEGAL ASPECTS OF FOREIGN INVESTMENT IN THE UNITED STATES 57-63 (Daniel M. Evans et al. eds., 1976); Paul McCarthy, *Government Regulation of Foreign Investment in the United States*, in CURRENT LEGAL ASPECTS OF FOREIGN INVESTMENT IN THE UNITED STATES 84, at 92-101 (Daniel M. Evans et al. eds., 1976); Michael V. Seitzinger, *Foreign Investment in the United States: Major Federal Restrictions*, Congressional Research Service Reports 10-27, 89-376, (1989); Cecilia M. Waldeck, Note, *Proposals for Limiting Foreign Investment Risk Under the Exon-Florio Amendment*, 42 HASTINGS L.J. 1175, 1255-56 (1991) [hereinafter Note, *Exon-Florio Amendment*]. For an overview of U.S. restrictions for multinational enterprises see Detlev F. Vagts, *The United States of America and the Multinational Enterprise*, in NATIONALISM AND THE MULTINATIONAL ENTERPRISE 3, 8-19 (H.R. Hahlo et al. eds., 1973).

240. Note, *Exon-Florio Amendment*, *supra* note 239, at 1233.



World War II still many restrictions and discriminations existed and continue to exist.<sup>241</sup> Particularly restrictive and discriminatory in this context are: the control of alien investment by procedural impediments;<sup>242</sup> the extensive powers under the Exon-Florio Amendment;<sup>243</sup> the far-reaching possibilities for restrictions in the sector of radio communications, which partly can be traced back to enemy state legislation;<sup>244</sup> and the tax burdens for alien corporations adjusted in a short time reaction to the respective developments of internal trade, which meanwhile on account of the instrument of treaty overriding no longer acknowledge international treaties in force as boundaries to municipal restrictive law-making. Besides the restrictions illustrated, the widely spread principle of the control theory originating from enemy state legislation (i.e., the Trading with the Enemy Act),<sup>245</sup> appears to reflect an on-going history of discrimination.

### c. Lack of Democratic Representation

A fundamental factor for attributing suspect classification status to a criterion of differentiation is the leitmotif of democratic participation. Particularly, for the criteria of race and national origin, the application of strict scrutiny aims to compensate, on the (secondary) court level, for a lack of democratic representation and participation of minorities with the consequential political powerlessness, and by attempting to ensure democratic participation (on a primary level), for the future in some way, *inter alia*, by granting affirmative action.<sup>246</sup> This objective particularly comes forth in factor (3), stigmatization of a politically powerless segment of society.

On first sight, rating alien and foreign corporate nationality as a suspect classification criterion does not seem to achieve this objective. In the constellation of foreign corporations, generally economic participation alone

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241. Compare cites *supra* in note 239.

242. See the discussion *infra* part IX.A.10.

243. Omnibus Trade and Competitiveness Act of 1988 § 5021, Pub. L. No. 100-418, 102 Stat. 1107, 1425 (1988) (codified as 50 U.S.C. § 2170 (West 1991 & 1993 Supp.)). See also the discussion *infra* part IX.A.1.

244. See the discussion *infra* part IX.A.7.b.

245. 50 U.S.C. §§ 1-44 (West 1990 & 1993 Supp.).

246. See also *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973); *Mercado v. Kingsley Area Schools*, 727 F.Supp. 335, 344 (W.D. Mich. 1989); ELY, *supra* note 39, at 82-87; TRIBE, *CONSTITUTIONAL LAW*, *supra* note 32, at 1451-54 and 1465-66; FISS, *supra* note 29, at 154-56. For the aspect of decontextualization in equal protection jurisprudence in the field of racial inequality compare Johnathan P. Nelson, *The Emergence of Decontextualization in the Equal Protection Jurisprudence of the United States Supreme Court*, 29 WILLAMETTE L.REV. 669 (1993).

is asked for. Therefore, awarding suspect classification status with consequential strict scrutiny would have to be based upon other evaluations. It seems to be a particular problem that discrimination of domestic corporations against domestic natural persons, which might become relevant, for instance, in state tax legislation, are also only reviewed under the simple rational basis test, since these are to be attributed simply to the "profane" non-political economic area and economic freedoms.<sup>247</sup>

On the other hand, the economic, legal, and political framework may only be changed by participation in the democratic processes and legislation. Such participation, also in the form of lobbying, can prevent the passage of discriminating legislation. Therefore, it is not inconsistent to argue that the lack of representation of alien and foreign corporations in state and federal legislative organisms should at least be compensated for, on a secondary level, by increased judicial protection.

A similar argument, which reminds one of Ely's theory of representation reinforcement,<sup>248</sup> is to be found in a student note discussing *Western & Southern Life Insurance Co. v. State Board of Equalization*.<sup>249</sup> The note argues that foreign corporations are characterized by a lack of political representation. The political process of a state, the note argues, provides enough checks and balances for domestic persons against arbitrarily burdensome legislation. However, this control is lacking as to the regulation of doing business of foreign corporations.<sup>250</sup> This factor is supposed to lead to the increased intensity of equal protection scrutiny, that is to "fair and substantial relation scrutiny of means."<sup>251</sup> Furthermore, if the actual governmental goal sought to be achieved is found unconstitutional, the Court should not—as it is generally done—uphold the regulation, if it only finds another perceivable goal of the regulation that is constitutional.<sup>252</sup> On the contrary, a stricter "actual purpose scrutiny" should be applied, which merely looks to the goal of differentiation brought forward by the legislature.<sup>253</sup>

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247. See also *infra* section 4.

248. ELY, *supra* note 39, at 87; see also Ron Replogle, Note, *The Scope of Representation-Reinforcing Judicial Review*, 92 COLUM. L. REV. 1592 (1992).

249. 451 U.S. 648 (1981).

250. Kirk D. McQuiddy, Note, *Taxing Out-of-State Corporations After Western & Southern: An Equal Protection Analysis*, 34 STAN. L. REV. 877, 893-95 (1982) [hereinafter Note, *Taxing*].

251. *Id.* at 897-98.

252. See also *supra* part II.C.

253. Note, *Taxing*, *supra* note 250, at 895-97.

*d. Unalterable Trait*

To transfer the argumentative line of an unalterable trait (factor 4) to corporations seems somewhat questionable. One might assert the possibility of "traits" of a corporation due to its legal entity status, although one has to keep in mind that those originally and properly referred to natural persons. The question of unalterableness, however, seems to be problematic. For alien natural persons, the unalterableness of alienage has been questioned because aliens may apply for U.S. citizenship under certain preconditions, particularly five years of U.S. residence, and thus, may eliminate the factor of discrimination with administrative assistance. This should hold true even more for foreign corporations, at least under the rule of incorporation inherent in U.S. law,<sup>254</sup> since here no time limit has to be fulfilled. A (re-)incorporation in the U.S. or the incorporation of a U.S. subsidiary is possible any time, though under some financial expense. However, there will be an additional financial and organizational expenditure, if a subsidiary is incorporated and now two organizational centers have to be managed. For a reincorporation in the U.S. the argument of troublesomeness and costs<sup>255</sup> cannot be advanced as easily as in countries following the seat rule: Only according to the (German) seat rule an effective domestic management is essential for maintaining status as a

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254. See, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87-94 (1987); *Liverpool London Life Ins. Co. v. Massachusetts*, 77 U.S. (10 Wall.) 566 (1870); *McDermott Inc. v. Lewis*, 531 A.2d 206 (Del. 1987); *SCOLES & HAY*, *supra* note 11, at 913-14 and 918-20; *RUSSELL J. WEINTRAUB*, COMMENTARY ON THE CONFLICT OF LAWS 304 (3d ed. 1986 & 1991 Supp.); Norwood P. Beveridge, *The Internal Affairs Doctrine: The Proper Law of a Corporation*, 44 BUS. LAW. 693 (1989); Henry E. Foley, *Incorporation, Multiple Incorporation and the Conflict of Laws*, 42 HARV. L. REV. 516, 518-19 (1929); Hadari, *supra* note 5, at 7-8; Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 633 (1988); Vagts, *supra* note 6, at 1525-30; 19 C.J.S. *Corporations* § 893 and § 896 (1990). See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 302, 304-09 (1971).

255. In detail, there might be four considerations advanced against immediate (re-)incorporation. First, business might be considerably more difficult if the alien corporation is doing business in several countries on a sort of medium business activity level in each and now should be forced to incorporate a subsidiary in each of those countries. Second, the U.S. business activity volume might not suffice to make incorporation of a subsidiary profitable. Third, the special organizational structure of the individual corporation might insure that a central management in the foreign, home, country will work more efficiently and profitably. Fourth, many restrictions for alien corporations not only are connected to the alien nationality of the corporation itself, but additionally by way of the control criterion, look to the alien persons controlling the (domestic) corporations, so that reincorporation in the United States is of no help.

domestic corporation.<sup>256</sup> According to the U.S. rule of incorporation, however, it is not necessary to do business at the seat of the (U.S.) corporation to maintain domestic corporation status.

*e. Parallel to Nonresidency?*

If alienage or nationality of a corporation is not thought equivalent to nationality or alienage of a natural person, but treated as correspondent to the criterion of "nonresidency" of a natural person, strict scrutiny is also necessitated. Established Supreme Court doctrine uses strict scrutiny in this situation, although different doctrinal aspects govern. Whereas alienage basically is considered a suspect criterion in the context of state classifications, nonresidency in the state is not viewed as such. Nonresidency, usually, is the ultimate starting point in the context of the so-called right to interstate travel, which is an accepted fundamental right leading to strict scrutiny under the fundamental rights branch of the Equal Protection Clause.<sup>257</sup> An equation of nonresidency and foreign or alien nationality of a corporation is not too far-fetched, it is used by some authors, by some courts, and in some statutes.<sup>258</sup> However, clinging to nonresidency leads to strict scrutiny on the described indirect path only for classifications by the states. For federal classifications, the situation is ambivalent, particularly due to an overlap with considerations of legislative powers, a right to travel abroad is not recognized.<sup>259</sup>

*f. Parallel to the Political Function Exemption?*

Whereas for state discriminations against alien natural persons a political functions exception from strict scrutiny is recognized,<sup>260</sup> there seems to be no ready parallel in the situation of foreign or alien corporations. These are not put into a situation where they have to fight back against discrimination

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256. See especially Carsten Thomas Ebenroth, *Gaining Access to Fortress Europe—Recognition of U.S. Corporations in Germany and the Revision of the Seat Rule*, 24 INT'L LAW. 459 (1990); see also Hartwin Bungert, *Deutsch-amerikanisches internationales Gesellschaftsrecht—Staatsvertragliche Festschreibung der Überlagerungstheorie?* ["German-American Conflict of Corporate Laws"], 93 ZVglRWiss 117 (1994).

257. See the citations, *infra* section 2, particularly *Shapiro v. Thompson*, 394 U.S. 618 (1969); in this context, see also E. Thaddeus Lewis, Note, *Constitutional Law—Balancing Test in Durational Residence Equal Protection Analysis*—Williams v. Zobel, 56 WASH. L. REV. 763 (1981).

258. See *supra* note 14 *et seq.*

259. See immediately *infra* at section 2.c.

260. See *supra* part III.A.4.

in regard to political functions and offices. For the exemption for illegal aliens discussed *supra*,<sup>261</sup> there is also no direct parallel for foreign or alien corporations.<sup>262</sup>

### *g. Summary*

To sum up, although not all of the four generally acknowledged factors are completely fulfilled, which would necessitate rating foreign corporate nationality and alien corporate nationality as a suspect classification, many arguments can be made that at least several factors are fulfilled to a large extent. These factors or *topoi* do not have, as previously mentioned,<sup>263</sup> the character of inalienable preconditions, but only of *indicia*. The more of them that are clearly fulfilled, the more probable the application of strict scrutiny. In view of the doctrinal evaluation practiced in the U.S., it appears to be too daring to ask for strict scrutiny review for differentiations on account of foreign or alien corporate nationality, particularly when considering that jurisprudence and literature clearly strive to limit application of strict scrutiny in order to maintain an adequate relationship between the judicial and the legislative branch and in fear of an excessive judicial activism. However, the delineation above made it obvious that in relying on the structural equal protection doctrine advanced by the Supreme Court itself, it is no longer consistent to apply merely rational basis review in the constellations considered. Due to the *indicia* character of the factors discussed, it appears inevitable to rate a legislative differentiation on account of "foreign or alien corporate nationality" as quasi-suspect, consequentially triggering intermediate scrutiny.

## 2. Parallel to the Right to Travel as a Fundamental Right?

Arguments necessitating at least intermediate scrutiny can also be made from the approach of the so-called fundamental rights branch of the Equal Protection Clause, which usually also triggers strict scrutiny. I will dwell upon this approach in the following.

### *a. The Doctrine of Fundamental Rights Equal Protection*

Thus far, the following have qualified as fundamental interests, resulting in strict scrutiny review under the Equal Protection Clause: the right to vote;

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261. See *supra* part III.A.5.

262. But see the special considerations of parallelism *infra* at the end of section 3.b.

263. *Supra* part II.B.

the right to privacy, particularly the right of procreation and the right to marry; procedural guarantees in criminal proceedings, and the more general right of access to courts; and the right to travel, more accurately the right to interstate migration.<sup>264</sup> Similar and additional fundamental interests were acknowledged under the Due Process Clause as substantive due process, triggering a similarly strict level of constitutional review. However, in the well-known decision of *San Antonio Independent School District v. Rodriguez*,<sup>265</sup> for instance, education was denied the status of a fundamental right in the sense of the Equal Protection Clause.<sup>266</sup> The respective fundamental right or interest must be guaranteed explicitly or implicitly by the Constitution.<sup>267</sup>

Considering this doctrinal construction, it is interesting to ask for the essential difference between a constitutional review under the fundamental rights equal protection approach, i.e., that is application of strict scrutiny under the Equal Protection Clause, if it is indicated by an infringement upon fundamental rights or interests, and the so-called direct substantive review, i.e., constitutional review as to an encroachment upon the substantial fundamental right (freedom right) itself. This question seems to be seldom asked in U.S. constitutional doctrine.<sup>268</sup> The answer probably has to be that the Equal Protection Clause predominantly guards fundamental interests that are not protected or guaranteed independently by a rights or liberties provision of the Constitution, although the clause comprises also the protection of those rights which implicitly underlie the system of the Constitution or its several provisions.<sup>269</sup> According to Neuman, fundamental rights equal protection provides a protection in addition to the substantive liberal rights; because, by emphasizing the distributive aspect of basic rights, it also prevents restrictions of the majority laid upon the minority, which might be upheld due to their universal application when taking strictly the perspective of a liberal right.<sup>270</sup>

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264. See NOWAK & ROTUNDA, CONSTITUTIONAL LAW, *supra* note 57, at 757-907; Lupu, *supra* note 27, at 1003-54; Note, *Developments*, *supra* note 34, at 1127-28. For the recognition of a right to engage in political expression as a fundamental right for corporations under the equal protection clause see *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 667-68 (1990).

265. 411 U.S. 1 (1973).

266. *Id.*

267. *Id.* at 30-34.

268. Exceptions are, e.g., Lupu, *supra* note 27, at 1027-54; Neuman, *supra* note 39, at 277-78; Westen, *supra* note 29, at 560-69; touched briefly also in Note, *Developments*, *supra* note 34, at 1128.

269. See also Note, *Developments*, *supra* note 34, at 1128; Lupu, *supra* note 27, at 1030-50; but see *id.* at 1060-75.

270. See Neuman, *supra* note 39, at 279-87, which, in my opinion, in its ultimate analysis is not persuasive.

Therefore, one might conclude generally that a categorical separation of the constitutional right prototypes of equal protection rights and fundamental freedom rights is not possible, but that a fusing of equal protection and fundamental freedom rights takes place in some areas, as elucidated here.<sup>271</sup> This commingling of equal protection rights and substantial freedom rights is also elucidated in the doctrinal concept of the Equal Protection Clause of *Perry*. *Perry* construes the principle of fairness to be underlying the Equal Protection Clause in three different variations: fairness-as-accuracy, fairness-as-nondiscrimination, and fairness-as-proportionality. Particularly in the third perspective, the close context of equality and proportionality is emphasized.<sup>272</sup>

### *b. Right to Interstate Migration For Foreign Corporations?*

Searching for a fundamental right of the alien or foreign corporation acknowledged by the Supreme Court that might be encroached upon by classifications on grounds of foreign corporate nationality, one could draw a parallel to the right to travel, also called right to interstate migration. The individual's right to move between and within the several states has always played an important role in the jurisprudence of the Supreme Court. It has been viewed as one of the fundamental cornerstones in the framework of the confederation. In the leading case of *Shapiro v. Thompson*,<sup>273</sup> the Court acknowledged it for natural persons as a fundamental right or fundamental interest under the fundamental rights branch of the Equal Protection Clause. Legislation that touches upon this right, particularly by attempting to impede

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271. For an opposition of a juxtaposition of equal protection rights and fundamental freedom rights see also Westen, *supra* note 29, at 539-77. According to Westen, equality is a derivative (secondary) relation, it is logically inferior to (freedom) rights. *Id.* at 548-49. Due to their comparative character, at least some equality rights, such as the Privileges and Immunities Clause, presuppose a substantive freedom right. *Id.* at 553-55. For an argument in favor of a close, but distinguishable, relation between freedom rights ("substantive protection") and equality rights ("equality-based protection") demonstrated using the example of the Privileges and Immunities Clause see John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992); see also, in traces, Michael J. Perry, *Constitutional "Fairness": Notes on Equal Protection and Due Process*, 63 VA. L. REV. 383, 385 (1977). For an approach of equality rights and freedom rights within the equal protection clause under the perspective of a comparative/noncomparative right see Kenneth W. Simons, *Equality as a Comparative Right*, 65 B.U. L. REV. 387 (1985).

272. *Perry*, *supra* note 271, at 390-413.

273. 394 U.S. 618 (1969). See also D. P. CURRIE, *THE SECOND CENTURY*, *supra* note 51, at 433.

migration between the states or to discourage new residents from settling down in the state by unfavorable regulation, is consequently subjected to strict scrutiny.<sup>274</sup> It must be kept in mind, however, that the Equal Protection Clause cannot grant a right of free entry or immigration to the state in the sense of a positive right of participation or a "negative" freedom, i.e., an individual's right to be safe from governmental interference.<sup>275</sup> This fundamental right may only be invoked under the relativistic, comparative, Equal Protection Clause, so that a state activity may be held unconstitutional only by means of a comparison with the disfavorably treated under a high-intensity level of review.

All Supreme Court decisions concerning the fundamental right to travel have so far addressed only natural persons. To the author's knowledge, no case concerning a corporation has been decided yet. However, it appears merely consistent to also grant corporations a right to travel or, respectively, a right to interstate migration, here in the form of the freedom of movement and freedom of establishment, since, after all, corporations are recognized as being able to invoke the Equal Protection Clause as well.<sup>276</sup> This fundamental right would be touched upon in the case of discriminations against foreign corporations as opposed to domestic corporations in the commercial area, so that strict scrutiny would have to be applied under the Equal Protection Clause.

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274. See NOWAK & ROTUNDA, CONSTITUTIONAL LAW, *supra* note 57, at 873-86; 2 ROTUNDA ET AL., CONSTITUTIONAL LAW, *supra* note 32, at 679-95; TRIBE, CONSTITUTIONAL LAW, *supra* note 32, at 1455-57; see also *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974).

275. For definition of these terms of constitutional doctrine see Ernst Brandl & Hartwin Bungert, *Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad*, 16 HARV. ENV'T'L L. REV. 1, 9-12 (1992).

276. See *supra* part IV.A.1. See particularly, *The Railroad Tax Cases*, 13 F. 722, 744 (D. Cal. 1882) (Field, J.) ("It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation."), *appeal dismissed as moot*, *San Mateo County v. Southern Pacific R.R. Co.*, 116 U.S. 138 (1885). According to this "Field rationale," "the courts will look through the ideal entity and name of the corporation to the persons who compose it, and protect them, though the process be in its name," *Railroad Tax Cases*, 13 F. at 748. Justice Field was confirmed by Chief Justice Waite in *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394, 396 (1886). See also Comment, *Personification*, *supra* note 2, at 1460; O'Kelley, *supra* note 159, at 1353-56.



*c. Expansion to Alien Corporations?*

The right to interstate migration was developed upon structural and systematic considerations for U.S. citizens, who should not become object of discrimination in the case of residence in another state. This follows, in particular, from the deduction of this fundamental right or interest from the concept of federalism. All the constellations of the Supreme Court's leading cases deal with U.S. citizens. On the other hand, however, the right to interstate travel has not been expressly denied to alien persons. The reason for the lack of Supreme Court decisions as to the question of a right to interstate travel for alien natural persons under the Equal Protection Clause probably is that alien discrimination in each case has been reviewed under the suspect classification prong of the Equal Protection Clause,<sup>277</sup> so that considerations concerning the fundamental interests prong of the Equal Protection Clause were unnecessary.

Thus, if one transfers the right to interstate migration as a fundamental right under the Equal Protection Clause to corporations, clearly foreign corporations are protected, corresponding to residents of other states. But it seems problematic whether the right to interstate travel may also be attributed to alien corporations, i.e., corporations organized under the law of another nation.

In this context, one should keep in mind that for natural persons and U.S. citizens the right to travel abroad, which has been invoked against federal discriminations, despite promising expectations<sup>278</sup> is not recognized as a fundamental right today, so that in this respect mere rational basis review is applied under the Equal Protection Clause. This is rooted particularly in the special competence of the federal government<sup>279</sup> in the field of law of citizenship and foreign policy.<sup>280</sup> On close inspection, the discriminatory restrictions for foreign corporations, extending the line of argument analogously, do not concern precisely a right to travel abroad. Alien corporations do not want to do business abroad, but in the U.S. Furthermore, as already explained, in the context of the suspect criterion approach, for corporations the considerations of federal powers relevant for the denial of a right to travel abroad for natural persons do not play an important role.

For attributing a right to interstate migration to alien corporations, one could argue that in legal literature the holders of this fundamental right are

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277. See *supra* part III.A.2.

278. *Kent v. Dulles*, 357 U.S. 116 (1958).

279. Several cases of the Supreme Court dealt with questions of issuing passports.

280. See *Regan v. Wald*, 468 U.S. 222, 240-44 (1984); *Califano v. Aznavorian*, 439 U.S. 170, 174-78 (1978); NOWAK & ROTUNDA, *CONSTITUTIONAL LAW*, *supra* note 57, at 868-73.

mostly referred to in a neutral manner. Nowak & Rotunda, for instance, simply speak of "persons,"<sup>281</sup> a term which could address natural persons and also corporations. Karst stated in 1977 that the basic principle of substantive equal protection is the guaranty of equal citizenship.<sup>282</sup> This statement rightfully is criticized as being too one-sided in view of the complexity of equal protection doctrine.<sup>283</sup> Furthermore, alien corporations should not be excluded as holders of a right to interstate migration in the sense of a fundamental right, solely because the notion of "citizen" in the Privileges and Immunities Clause is not applicable to alien, foreign and domestic corporations according to the Supreme Court's interpretation.<sup>284</sup> The steps of interpretation in the context of this clause are not transferable, because one deals with a sort of indirect interpretation of fundamental constitutional freedoms. Also, one could rely in this regard on a transferability of the similar interpretation of the diversity of citizenship jurisdiction clause of Art. III of the U.S. Constitution; the applicability of which to corporations was accepted by the Supreme Court in the end.<sup>285</sup>

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281. NOWAK & ROTUNDA, *CONSTITUTIONAL LAW*, *supra* note 57, at 883-86.

282. Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977).

283. *See, e.g.*, Lupu, *supra* note 27, at 1054-60.

284. *See* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 586-87 (1839) (Taney, C.J.); Bruce K. Adler, *The Corporation's Vade Mecum of Constitutional Rights*, 7 CORP. L. REV. 133, 138-39 (1984). For a critique of the decision see DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT—THE FIRST HUNDRED YEARS (1789-1888)* 237-40 (1985) (hereinafter D.P. CURRIE, *THE FIRST HUNDRED YEARS*); HENDERSON, *FOREIGN CORPORATIONS*, *supra* note 167, at 42-49. *See also* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 181 (1868); and the citations in note 181 *supra*.

285. Initially, the Supreme Court in *Bank of United States v. Deveaux* denied corporations the status of citizens as used in the diversity of citizenship clause, because [t]hat invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the Union. . . . That name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other. . . .

*Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86-87 (1809). But later the Court used a fiction and treated corporations as if they were citizens, *Marshall v. Baltimore & O. R.R.*, 57 U.S. (16 How.) 314, 329 (1853); *Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497, 558 (1844); HENDERSON, *FOREIGN CORPORATIONS*, *supra* note 167 at 60-62; Dudley O. McGovney, *A Supreme Court Fiction: Corporations in the Diverse Citizenship Jurisdiction of the Federal Courts*, 56

This transfer would particularly be suggested by the perspective of optimization of judicial protection. Finally, the right to interstate travel is not a civic right in its narrow sense, which would only be available to citizens.<sup>286</sup> Furthermore, the criterion of foreign corporate nationality seems to be comparable to the criterion of residence which was used by most regulations underlying the decisions on the right to interstate travel.<sup>287</sup>

According to these considerations, there are no profound objections against transferring the right to interstate travel to alien corporations. The potential constructive doctrinal difficulties discussed previously might cause one not to be willing to conceive this right as a fundamental right in the context of foreign and alien corporations. In any case, it is a quasi-fundamental right, so that respective differentiations are subjected to intermediate scrutiny.

#### *d. Right of Access to Courts*

Alien and foreign corporations, furthermore, must be able to invoke the right of access to courts, acknowledged by the Supreme Court as a fundamental right under the Equal Protection Clause.<sup>288</sup> Some speak of a fundamental right to equal litigation opportunity in this respect.<sup>289</sup> These

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HARV. L. REV. 853 (I), 1090 (II), 1225 (III) (1943); Neil J. Rubenstein, *Alienage Jurisdiction in the Federal Courts*, 17 INT'L LAW. 283, particularly 288-90 and 295-97 (1983); H. Geoffrey Moulton, Jr., Note, *Alien Corporations and Federal Diversity Jurisdiction*, 84 COLUM. L. REV. 177, 193-96 (1984); see also James W. Moore & Donald T. Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426 (1964).

286. In the context of the Privileges and Immunities Clause of the Fourteenth Amendment the Supreme Court defined specific civic rights, i.e., rights specifically connected to U.S. citizenship, such as the right to petition or the right to vote, which are the only "privileges" protected in that constitutional provision. Thereby, the Court placed the fundamental rights incorporated in the Bill of Rights as well as all other rights or privileges connected with state citizenships out of the reach of the Privileges and Immunities Clause. See *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 79-81 (1873); D.P. CURRIE, *THE FIRST HUNDRED YEARS*, *supra* note 284, at 342-51.

287. See NOWAK & ROTUNDA, *CONSTITUTIONAL LAW*, *supra* note 57, at 873-83; Lupu, *supra* note 27, at 1060-64.

288. As to this right *cf.* *Boddie v. Connecticut*, 401 U.S. 371 (1971); NOWAK & ROTUNDA, *CONSTITUTIONAL LAW*, *supra* note 57, at 889-93. A similar consideration, i.e., the application of a strict scrutiny review on account of the impairment of the fundamental right of access to courts for territorial discriminations, is found in Neuman, *supra* note 39, at 277.

289. TRIBE, *CONSTITUTIONAL LAW*, *supra* note 32, at 1461-63.

considerations would also provoke application of a strict scrutiny review for alien and foreign corporations under the Equal Protection Clause.

### 3. Significance of Qualification for Doing Business Under the Equal Protection Doctrine

#### *a. Requirements and Consequences of Qualification*

Foreign and alien corporations, according to each state's statutory law—the statutes are either called "qualification statutes" or "foreign corporation laws"—have to register or to be admitted by the Secretary of State or a comparable agency, before doing business within that state. The corporation has to file a copy of its certificate of incorporation with the Secretary of State and to name an instate registered agent, particularly for purposes of service of process. "Doing business," a precondition for qualification, commences when the foreign or alien corporation carries out a substantial part of its business transactions in the state, permanently rather than occasionally.<sup>290</sup> Simply maintaining an office in the guest state, for instance, does not constitute doing business.<sup>291</sup> Although states differ considerably in how many contacts they require for "doing business" or "transacting business,"<sup>292</sup> most of them have statutory lists of activities not constituting doing business, modelled after R.M.B.C.A. § 15.01(b).<sup>293</sup> In

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290. For this complex see, e.g., William Laurence Walker, *Foreign Corporation Laws: A Current Account*, 47 N.C. L. REV. 733 (1969); William A. Holby, Note, "Doing Business": Defining State Control Over Corporations, 32 VAND. L. REV. 1105 (1979) [hereinafter Note, *Defining State Control*].

291. *James v. United Artists Corp.*, 305 U.S. 410 (1939); *Elsner v. United Am. Util., Inc.*, 180 A. 589 (Del. Ch. 1935); *People v. Horn Silver Mining Co.*, 11 N.E. 155 (N.Y. 1887).

292. See A GUIDE TO FOREIGN INVESTMENT UNDER UNITED STATES LAW, [STUDY OF THE AMERICAN BAR ASSOCIATION, COMMITTEE TO STUDY FOREIGN INVESTMENT IN THE UNITED STATES] 54-55 (Allan R. Roth ed., 1979); Patricia L. Grove, "Doing Business" in Oklahoma: Will Minimum Contacts Subject a Foreign Corporation to Oklahoma's Qualification Statutes?, 17 TULSA L.J. 23 (1980); John J. Stenger & William B. Gwyn, Jr., *Foreign Corporations in North Carolina: The "Doing Business" Standards of Qualification, Taxation, and Jurisdiction*, 16 WAKE FOREST L. REV. 711 (1980); Robert V. Okulski, Comment, *Qualification Requirements*, *supra* note 194; Note, *Foreign Corporations: What Constitutes "Doing Business" under New York's Qualification Statute?*, 44 FORDHAM L. REV. 1042 (1976); 18A FLETCHER CYC. CORP. § 8804.1 (1987).

293. See, e.g., California, CAL. CORP. CODE § 191(c) (West 1993); Delaware, DEL. GEN. CORP. L. § 373, DEL. CODE ANN. tit. 8, § 373 (1993); Florida, FLA. STAT. ANN. § 607.1501(2) (West 1992); New York, N.Y. BUS. CORP. LAW § 1301(b)

order to enforce the qualification requirement the states establish sanctions such as fines, personal liability of the shareholders by not recognizing the corporate veil of a non-qualified ("unauthorized") foreign corporation, denial of judicial protection for suits connected to the business activities in instate courts, or, rarely, voidness or invalidity of the contracts concluded by the non-qualified foreign corporation.<sup>294</sup>

In this section the significance of "qualification" of an alien or foreign corporation for equal protection analysis will be discussed. As pointed out earlier,<sup>295</sup> its point of departure is that the equal protection itself is (internationally) applicable to foreign and alien corporation for every state discrimination that touches upon interstate commerce or foreign commerce, according to a conflict of constitutional laws approach.

### *b. Significance of Qualification According to the Traditional Concept*

According to the traditional concept, however, on the conflict of constitutional laws level, the Equal Protection Clause merely commenced to be applicable for regulations of intrastate commerce, when the alien or foreign corporation was admitted by the state to do business within the state, the so-called qualification, even if for the act of qualification no conditions unconstitutional themselves could be imposed.<sup>296</sup> Obviously, a gap in judicial protection opens here, which renders discriminations against alien and foreign corporations constitutional. According to the traditional view, the courts seem to have developed a parallel between qualification and the reservation clause of the Equal Protection Clause of "within its jurisdiction." The state could set the conditions for qualification, which usually relies upon doing business, at its leisure, but only after qualification was the foreign corporation "within its jurisdiction," and only then, could the foreign corporation invoke the Equal Protection Clause. Therefore, a corporation not

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(McKinney 1986 & Supp. 1993); citations in 17A FLETCHER CYC. CORP. § 8464.1 (1987).

294. See Note, *Sanctions for Failure to Comply with Corporate Qualification Statutes: An Evaluation*, 63 COLUM. L. REV. 117 (1963); 17A FLETCHER CYC. CORP. §§ 8447-48, 8507 (1987); compare, e.g., MONT. CODE ANN. § 35-1-1027(1),(5) (1993); N.Y. BUS. CORP. LAW § 1312 (McKinney 1986 & 1993 Supp.); VT. STAT. ANN. tit. 11, § 2120 (1993).

For treatments of the whole complex of qualification see, e.g., Walter O'Connor, *Foreign Companies Doing Business With the United States*, 21 TAX ADVISOR 37 (1990); Walker, *supra* note 290; Note, *Defining State Control*, *supra* note 290.

295. See *supra* part IV.A.

296. See *supra* part IV.A.3-5.

admitted does not even fall under the protective shield of the Equal Protection Clause, so that the question of the applicable level of scrutiny does not arise. Left without protection are primarily those foreign or alien corporations that in an unlawful way did not apply for qualification, although they crossed the threshold of doing business due to the amount of their state contacts. Those are subjected to sanctions in the state qualification statutes, but in fact did cross the border of "within its jurisdiction," because they fulfill the doing business criterion, so that the Equal Protection Clause is applicable according to conflict of constitutional laws. Since qualification itself becomes obligatory merely above the threshold of state contacts of doing business, those corporations that have very few state contacts were left without equal protection because those are not subject to the qualification requirement; so that theoretically they never could come within the protection of the "within its jurisdiction" formula.

The traditional view, additionally, leads to an unequal treatment of alien juridical and alien natural persons, if one equates the notions of residence and qualification. If one puts, for purposes of equal protection doctrine, a foreign corporation after qualification on par with a resident alien, and a foreign corporation before or without qualification on par with a non-resident alien or illegal alien, respectively,<sup>297</sup> by transferring the Supreme Court's equal protection doctrine for state discriminations of aliens,<sup>298</sup> strict scrutiny should be applicable in the first constellation and rational basis review in the second constellation. In fact, however, according to traditional doctrine, alien and foreign corporations do not enjoy any protection under the Equal Protection Clause before registration, pursuant to the level of conflict of constitutional laws.

### *c. Significance of Qualification Under a Modern Concept*

According to the modern view, this problem and this unequal treatment within the Equal Protection Clause itself should no longer exist. In *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*,<sup>299</sup> the—conflict of constitutional laws—restriction of the "within its jurisdiction" reservation clause of the Equal Protection Clause is defeated. In the general remarks on the extraterritorial reach of the U.S. Constitution the approach of a subjection factor becomes strong. Every (alien) corporation affected by an act of an U.S.

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297. This might suggest itself, because by means of qualification the foreign or alien corporation is registered with the Secretary of State and is administered by its administration, appoints an agent of service and thus may do in-state business without sanctions.

298. See *supra* part III.A.2-5.

299. 262 U.S. 544 (1923).

federal or state branch of government may have recourse to an U.S. court and invoke the Equal Protection Clause.<sup>300</sup> This concept of irrelevance of qualification for the applicability of the Equal Protection Clause would probably also be reached by emphasizing the previously mentioned fundamental right of access to courts.<sup>301</sup>

#### 4. Unconstitutional Unequal Treatment of Alien Natural and Alien Juridical Persons Under the Equal Protection Clause Itself?

Attempting to apply strict or, at least, intermediate scrutiny to governmental acts distinguishing on account of the criterion of foreign or alien corporate nationality, an argument can be made that the differentiation of the Supreme Court's jurisprudence itself between application of strict scrutiny for classifications against alien natural persons, in the regular constellation, and application of the wide rational basis test for classifications against alien juridical persons establishes unconstitutional unequal treatment. This argument has not been made yet, as far as I can see. In any case, the lack of such a claim does not stem from the fact that the (foreign) corporation does not have a complete constitutional entity status,<sup>302</sup> because at least all constitutional right provisions are applicable to (foreign) corporations that refer to "persons." Points of discussions for such a suggested "internally comparative"<sup>303</sup> line of arguments are put forward by Laycock, who considers the parallel goals of national unity and interstate equality imminent in the structurally related constitutional provisions of the Equal Protection Clause, the Privileges and Immunities Clause and the Commerce Clause in its equality component to the same extent desirable, independent whether foreign natural persons or foreign corporations are affected by state discriminations. Therefore, he argues for a modification of the Supreme Court's

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300. See *supra* part IV.A.4.

301. See *immediately supra* part IV.C.2.d.

302. The following constitutional rights are applicable to (foreign) corporations: the right to freedom of speech, the protection against takings, protection against unreasonable searches and seizures, the Double Jeopardy Clause of the Fifth Amendment, the Due Process Clause, the Equal Protection Clause, the diversity jurisdiction of U.S. CONST art. III, § 2, cl. 1. Not applicable are the privilege against self-incrimination of the Fifth Amendment, the right to privacy, or the Privileges and Immunities Clauses. See Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990). See also BUNGERT, ALIEN CORPORATIONS, *supra* note 23, chapter 8.

303. This expression refers to a comparison of different constitutional provisions of non-discrimination within the Constitution itself.

jurisprudence.<sup>304</sup> However, this line of arguments appears to be only conceived for the particularly close relationship of interstate or foreign objects of comparison, not for alien persons.

On the other hand, cases reflect express statements that governmental classifications between corporations and natural persons or unincorporated aggregates, particularly in the field of tax law, principally do not violate the Equal Protection Clause, except when they are arbitrary and without a rational interest.<sup>305</sup> Sometimes not very convincingly, the act of doing business in corporate form itself is considered as such an advantage that a consequential burden, e.g. taxation, for the corporation without a respective burden for the natural person or the non-corporate association is viewed as justified.<sup>306</sup> Mostly these statements are coined for domestic corporations and natural persons, but this is not necessarily so.

Some authors suggest that a differentiation between natural persons and corporations might be challenged under the Equal Protection Clause, but will be held unconstitutional only if no rational interest is found for the respective differentiating regulation in the specific constellation.<sup>307</sup> Sometimes, the more general statement is found that a differentiation between natural persons and corporations amounts to a violation of the Equal Protection Clause, because equal situations are treated unequally, which particularly would be indicated by the perspective of natural persons looming behind the corporate veil.<sup>308</sup>

Thus, for different treatment of corporations and natural persons generally or, respectively, of domestic corporations and natural persons merely the weak rational basis test is used. In an old Supreme Court case of 1938, one encounters a formulation which in its literal meaning seems to suggest that for alien corporations strict scrutiny is applicable. There, the Court held that alien juridical persons may invoke the protection of the Equal Protection

304. Laycock, *supra* note 226, at 269-70.

305. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Lawrence v. State Tax Comm'n of Mississippi*, 286 U.S. 276 (1931); *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*, 262 U.S. 544, 551 (1923); *Michigan Cent. R.R. v. Powers*, 201 U.S. 245 (1906); *Road Improvement Dist. No. 7 v. St. Louis-San Francisco R.R.*, 28 F.2d 825 (8th Cir. 1928); 14A FLETCHER CYC. CORP. § 6925 (1987).

306. *Lehnhausen*, 410 U.S. at 365.

307. *See, e.g.*, HORST EHMKE, WIRTSCHAFT UND VERFASSUNG—DIE VERFASSUNGSRECHTSPRECHUNG DES SUPREME COURT ZUR WIRTSCHAFTSREGULIERUNG [ECONOMY AND CONSTITUTION—THE SUPREME COURT JURISPRUDENCE ON REGULATING THE ECONOMY] 405 (1961).

308. *See, e.g.*, Green, *supra* note 181, at 236. It should be noted that this general conclusion is probably not conclusive.



Clause exactly to the same extent as alien natural persons.<sup>309</sup> However, one must keep in mind that at that time the modern two tier-doctrine of the Equal Protection Clause did not exist yet, so that the Court's wording could not signify a credo-like application of strict scrutiny.<sup>310</sup> Besides, that decision concerned the Due Process Clause of the Fourteenth Amendment, not the Equal Protection Clause. Consequently, the constitutional evaluation of the "internally comparative" argumentative figures within the Equal Protection Clause, that is, the question of a violation of the Equal Protection Clause by applying differently intensive levels of constitutional review to alien natural and alien juridical persons itself, is still left open. However, it seems unlikely that the Supreme Court will start to use strict scrutiny for discriminations against alien or foreign corporations solely based on this argument.

### 5. Different Standard of Review for Federal and State Differentiations

For alien natural persons the Supreme Court practices different standards of review under the Equal Protection Clause, strict scrutiny for state differentiations of resident aliens, except in constellations touching upon political functions or restrictions for illegal aliens or nonimmigrant aliens; and low level scrutiny for federal differentiations.<sup>311</sup> Should this dual track structure be transferred to alien juridical persons? So far, the decisions of the Supreme Court, on the one hand, concern predominantly state differentiations. On the other hand, at present such a distinction may not be used, because for foreign or alien corporations the rational basis test is evenly used.

In favor of a uniform standard of scrutiny for foreign corporations the argument could be made that although the Federation may still have legislative powers for interstate and foreign commerce, the power of naturalization is not involved at all. In this respect, the situation is different from that of alien natural persons. Therefore, the uniform use of the proposed intermediate scrutiny is strongly recommended. This use would not amount to a violation of the Equal Protection Clause, discussed *supra* in the reverse direction,<sup>312</sup> by unequal treatment of alien natural and juridical persons as to the standard

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309. *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 79-80 (1938) ("A corporation which is allowed to come into a state and there carry on its business may claim, as an individual may claim, the protection of the Fourteenth Amendment against subsequent application to it of state law.").

310. See also Michael Kuzow, Comment, *Corporate Aliens and Oklahoma's Alien Landownership Restrictions*, 16 TULSA L.J. 528, 542 (1981) [hereinafter Comment, *Corporate Aliens*].

311. See *supra* part III.A.2-5 and B.1.

312. See immediately *supra* part IV.C.4.

of review. Obviously, here the constitutional situation, particularly as to the legislative powers, is not comparable. Furthermore, some authors suggest an expansion of strict scrutiny for alien natural persons to certain federal acts,<sup>313</sup> but no one argues conversely for an extension of the rational basis test to state acts.

## 6. Distinguishing Other-Country Corporations and Other-State Corporations

It is difficult to decide whether the application of intermediate scrutiny argued for *supra* should merely be used for foreign corporations, i.e., corporations from other states, or also for alien corporations, i.e., corporations from other countries. On the one hand, there are few sources in U.S. jurisprudence or legal literature. On the other hand, there is the problem initially mentioned,<sup>314</sup> that the notion "foreign corporation" is sometimes restricted to out-of-state corporations, but sometimes it is used in a broad sense including alien corporations, whereas the differing use is often not discernible from the text of the individual provision.

In my opinion, however, it does not seem too daring to expand strict or at least intermediate scrutiny to alien and foreign corporations in the same way. First, in the context of natural persons strict scrutiny was used expressly for alien persons.<sup>315</sup> Second, the interstate and foreign Commerce Clause in its aspect of a non-discrimination clause is unhesitatingly applied in favor of alien corporations.<sup>316</sup> Third, approaching a subjection factor on the conflict of constitutional laws level for the Equal Protection Clause insinuated in *Kentucky Finance Corp. v. Paramount Auto Exchange*<sup>317</sup> speaks in favor of a uniform protection of foreign and alien corporations not only by the Equal Protection Clause itself, but also by the same intensity of constitutional review.

## 7. Domestic Corporations Controlled by Aliens

Considering the types of differentiations used in statutory business law as to juridical persons (corporations), one has to distinguish a third category besides alien natural persons and alien juridical persons: domestic juridical

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313. See *supra* part III.B.3.

314. See *supra* part I.

315. and not "foreign" persons.

316. See, particularly, *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1 (1986) (Canadian corporation); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) (Japanese corporation).

317. 262 U.S. 544 (1923). See *supra* part IV.A.4.

persons controlled by alien persons (control theory). It is doubtful whether these resemble more closely resident aliens, that is alien natural persons, suggesting use of strict scrutiny, or foreign corporations, suggesting use of rational basis review.<sup>318</sup>

As far as I can see, in Supreme Court cases the question of which standard of review should be used for domestic corporations controlled by alien persons under the Equal Protection Clause has not yet arisen, nor decided. The question generally is not discussed in literature. Some authors, however, assume that probably minimum scrutiny of the rational basis test will be applicable, if a statute is under equal protection review that uses a classification on the basis of shareholders' nationality within the class of U.S. corporations.<sup>319</sup> One author additionally argues that strict scrutiny is triggered by certain individual, personalistic factors which in principle are not present in the case of corporations as juridical persons.<sup>320</sup>

Furthermore, there is the argument of abuse and circumvention. If nonresident aliens enjoy a weaker level of equal protection against discriminatory state laws on the economic sector than domestic corporations, i.e., merely rational basis review, this could provoke these aliens to do business in the form of a domestic corporation incorporated in the respective state, but controlled by them, in order to consequently enjoy additional rights.<sup>321</sup>

## 8. Reverse Discrimination Under the Equal Protection Clause

The Equal Protection Clause also covers the constellation of reverse discrimination, i.e., discrimination of domestic corporations in favor of foreign or alien corporations, which leads to a preferred treatment of foreign or alien corporations.<sup>322</sup> According to traditional doctrine, in these constellations, rational basis review is applied consistently.<sup>323</sup> Such a reason was found, for instance, in the constellation of a tax imposed upon domestic corporations, but not upon out-of-state corporations, in the creation of investment incentives for out-of-state corporations.<sup>324</sup> If, however, the state constitution contains

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318. As to this problem see also Note, *Exon-Florio Amendment*, *supra* note 239, at 1233-34.

319. See Morrison, *supra* note 230, at 643-44; Comment, *Corporate Aliens*, *supra* note 310, at 542. See also BERGER & MCCONNELL, *supra* note 136 at 9.

320. Comment, *Corporate Aliens*, *supra* note 310, at 542.

321. This danger is pointed out by BERGER & MCCONNELL, *supra* note 133, at 9.

322. See, e.g., *Northeast Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 176-78 (1985).

323. See, e.g., *id.* at 178.

324. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528 (1959). See also

an explicit non-discrimination clause in favor of alien or foreign corporations, such state legislation, particularly tax laws, may be unconstitutional.<sup>325</sup> Thus, for instance, the Equal Protection Clause of the U.S. Constitution and the equality provision of the Oklahoma Constitution was held violated by a statute that imposed higher taxes upon domestic corporations than upon foreign corporations for the same activity.<sup>326</sup>

In *National Paper & Type Co. v. Bowers*,<sup>327</sup> however, unconstitutional unequal treatment of domestic corporations was denied in the context of taxation, if by the federal tax statute domestic corporations are more heavily taxed than foreign corporations on their United States source income. It was held justifiable to leave the taxation to the foreign corporation's state of incorporation. A further justification for the different treatment was found in the attempt to entice alien business to the United States. Finally, it was argued that—as a sort of abstract quid pro quo for the tax—domestic corporations are favored by the possibility of diplomatic protection exerted on their behalf by the United States all over the world, whereas alien corporations are left to their proper home country. The constitutional yardstick of the decision has been the Equal Protection Clause read into the Due Process Clause of the Fifth Amendment.<sup>328</sup>

According to this author's equal protection concept it is self-evident that intermediate scrutiny comes into play also for the constellation of reverse discrimination. For the constellation of reverse discrimination, no higher or lower qualitative requirements for the justification and the relation between criterion of differentiation and goal of differentiation arise than for the constellations of ordinary discrimination.

## 9. Summary

To sum up, I argue that discrimination against alien and foreign corporations has to be reviewed under the Equal Protection Clause at least under the intermediate scrutiny standard, if not strict scrutiny. This implies that the differentiation used is only constitutional if it serves an important governmental interest and stands in an essential relation to achievement of this goal. Strict proportionality has to be maintained between the differentiation

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Barclay & Co. v. Edwards, 267 U.S. 442 (1925); 14A FLETCHER CYC. CORP. § 6926 (1987).

325. *Weems v. Bruce*, 66 F.2d 304, 307 (10th Cir. 1933); also *North Tintic Mining Co. v. Crockett*, 284 P. 328, 329-30 (Utah 1929); 14A FLETCHER CYC. CORP. § 6926 (1987).

326. *Weems v. Bruce*, 66 F.2d 304 (10th Cir. 1933).

327. 266 U.S. 373 (1924).

328. As to this constructive approach see *supra* part II (initial paragraph).

(the means) and the goal striven for (the end). This standard of review is applicable for discriminations against alien corporations as well as for discriminations against foreign corporations. According to the modern concept, furthermore, it does not matter whether the alien or foreign corporation fulfilled the preconditions of qualification or even had to fulfil them. Finally, intermediate scrutiny has to be applied uniformly for state and federal discriminations of foreign corporations, in the constellation of ordinary discrimination as well as in the constellation of reverse discrimination.

## V. PRIVILEGES AND IMMUNITIES CLAUSE

The Privileges and Immunities Clause guarantees intra-state equality.<sup>329</sup> In this function as a non-discrimination clause, it resembles the Equal Protection Clause.<sup>330</sup> Under the interstate Privileges and Immunities Clause fundamental activities are distinguished from nonfundamental activities. For the former, state differentiations have to be reviewed under a strict scrutiny test: The state must be able to set forward substantial reasons for its differentiation as well as a relation of the differentiation to the reasons. For nonfundamental activities, on the other hand, the Privileges and Immunities Clause does not apply. Here, review can only be done by using the minimum rationality standard under the Equal Protection Clause.<sup>331</sup> The Supreme Court's distinction between fundamental and nonfundamental sometimes seems vulnerable. For instance, there is supposed to be no fundamental right of moose hunting in Montana,<sup>332</sup> but there is supposed to be one of working at pipelines in Alaska.<sup>333</sup>

In a famous holding in *Toomer v. Witsell* the Supreme Court said that the Privileges and Immunities Clause does not provide absolute protection, but

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329. As to the overlap of Equal Protection Clause, Privileges and Immunities Clause, and Interstate Commerce Clause see also D.P. CURRIE, *THE SECOND CENTURY*, *supra* note 51, at 580-85.

330. See also SCOLES & HAY, *supra* note 11, at 103 and 109. For the relationship of the Equal Protection Clause and the Privileges and Immunities Clause, see B. Currie & Schreter, *supra* note 165, at 6-7. As to the strong parallels of dormant Commerce Clause and Privileges and Immunities Clause, see Sunstein, *supra* note 220, at 1710.

331. See *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978); *Toomer v. Witsell*, 334 U.S. 385 (1948); Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487, 509-16 (1981).

332. *Baldwin*, 436 U.S. at 387-88.

333. *Hicklin v. Orbeck*, 437 U.S. 518 (1978). For a critique see also TRIBE, *CONSTITUTIONAL LAW*, *supra* note 32, at 535-36.

allows a differentiation, if there is a substantial reason.<sup>334</sup> Thus, the Court committed itself to a substantial relationship test. Predominantly, the *Toomer* review standard for fundamental activities under the Privileges and Immunities Clause is not considered equal in intensity to strict scrutiny review under the Equal Protection Clause in intensity.<sup>335</sup> Rather, the *Toomer* test is said to equal the intermediate standard under the Equal Protection Clause.<sup>336</sup> Up to now the Supreme Court has clung to the substantial relationship test,<sup>337</sup> which may approach a strict scrutiny test.<sup>338</sup> In fact, however, it corresponds more to the intermediate scrutiny test.<sup>339</sup>

Many criticize the weakness of constitutional review under the *Toomer* test. Simson, for instance, argues that it probably is closer to the objective of the Constitution and the original understanding of the framers of the Constitution to use a strict scrutiny standard within the Privileges and Immunities Clause and to require not only a substantial, but a compelling governmental interest for the justification of a discrimination, at least against residents, as well as to require a relationship of essentiality between means and end of the governmental classification. By applying this standard of review, few state classifications, except for the residence requirement for election

334. *Toomer v. Witsell*, 334 U.S. 385, 396 (1948):

Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

335. See Varat, *supra* note 331, at 513-14. *Toomer*, 334 U.S. at 396, requires merely "substantial" and not "compelling" reasons of justification as well as a "close," and not a "necessary" means-end-relationship.

336. See ROTUNDA ET AL., CONSTITUTIONAL LAW, *supra* note 32, at 647-53; TRIBE, CONSTITUTIONAL LAW, *supra* note 32, at 532-45; Gary J. Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379, 381-82 (1980); Varat, *supra* note 331, at 514 n.109.

337. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985); *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 222 (1984); *Hicklin v. Orbeck*, 437 U.S. 518 (1978); *Austin v. New Hampshire*, 420 U.S. 656 (1975). See also Laycock, *supra* note 220, at 260.

338. Laycock, *supra* note 220, at 268.

339. Eule, *supra* note 222, at 454-55.

purposes and for employment at a public office, would survive.<sup>340</sup> However, in a more general context, some see the main difference between the Equal Protection Clause and the Privileges and Immunities Clause in the fact that the latter establishes a strict scrutiny test for its area of application, i.e., that a differentiation on account of state citizenship is treated like a differentiation by suspect classification and is upheld merely in few exceptional instances.<sup>341</sup>

As already mentioned, on the prior level of conflict of constitutional laws, following the traditional view of the Supreme Court, the Privileges and Immunities Clause does not apply to foreign corporations, and generally not to corporations, since they are not "citizens" in the understanding of this constitutional provision.<sup>342</sup> Thus, this constitutional provision cannot prohibit the imposition of licenses or discriminating taxes upon foreign corporations not admitted, either.<sup>343</sup> Although some, like Carpinello for instance, argue for the expansion of the Privileges and Immunities Clause to corporations,<sup>344</sup> the strong current Supreme Court doctrine does not make a change seem probable.

## VI. IMPAIRMENT OF OBLIGATIONS OF CONTRACT CLAUSE

It cannot generally be assumed that the state concludes an implicit contract with the foreign corporation upon admission, so that every subsequent imposition of additional burdens, and, particularly, taxes would be unconstitutional.<sup>345</sup> In some instances of taxing business transactions, however, a foreign corporation may be able to challenge a violation of the impairment of obligations of Contracts Clause of the U.S. Constitution which forbids an

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340. Simson, *supra* note 330, at 383-401. Compare the parallels in the differentiation between U.S. citizens and aliens under the Equal Protection Clause.

341. See, e.g., Laycock, *supra* note 226, at 266-67. See also Eule, *supra* note 228, at 454-55.

342. See citations in note 284, *supra*. See particularly *Western & S. Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 656 (1981); 18A FLETCHER CYC. CORP. § 8850 (1987); and recently Laycock, *supra* note 226, at 268. For discrimination between local and sister-state corporations in this context recourse must be found in the Commerce Clause or the Equal Protection Clause.

343. See *supra*, note 342.

344. George F. Carpinello, *State Protective Legislation and Nonresident Corporations: The Privileges and Immunities Clause as a Treaty of Nondiscrimination*, 73 IOWA L. REV. 351 (1988).

345. *Southern Ry. v. Greene*, 216 U.S. 400 (1910); *American Smelting & Refining Co. v. Colorado*, 204 U.S. 103 (1907); 18A FLETCHER CYC. CORP. § 8854 (1987).

impairment of existing contractual obligations by the state.<sup>346</sup> This constellation, ultimately, encounters again the unconstitutional conditions doctrine, according to which the state may admit a corporation under conditions as long as those do not violate the U.S. Constitution.<sup>347</sup> Therefore, a right of equal protection for foreign or alien corporations before admission cannot be founded on the Impairment of Obligations of Contract Clause.

After admission the Impairment of Obligations of Contract Clause offers no strong protection for foreign and alien corporations either. Despite its absolute wording, according to the Supreme Court's understanding, this constitutional provision does not completely disallow impairing statutes. Preconditions of a three-step-review for a violation of the impairment of obligations of contract clause are (1) that the state statute presents a substantial impairment of a contractual obligation, (2) that it does not intend the promotion of a substantial legitimate public interest, or (3) that there is no rational and close relation between the means of the impairment of a contractual obligation and the intended goal of promotion of the established public interest.<sup>348</sup> Due to these preconditions, a strong structural similarity to strict scrutiny review under the Equal Protection Clause is established. As opposed to its historic importance, however, this constitutional provision hardly plays a role in today's economic decisions of the Supreme Court.

## VII. COMMERCE CLAUSE

State restrictions of interstate commerce violate the Commerce Clause: First, when directly discriminating against persons of other states or in interstate commerce; and second, in cases of indirect discrimination that present an excessive burden on interstate commerce and are not justified by a local benefit.<sup>349</sup> State restrictions of foreign commerce are merely accepted, if, in addition to the preconditions outlined, no impairment of national unity takes

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346. U.S. CONST. art. I, § 10, cl. 1; *New York, L.E. & W.R. Co. v. Pennsylvania*, 153 U.S. 628 (1894); *see also* *American Smelting & Refining Co. v. Colorado*, 204 U.S. 103 (1907); 18A FLETCHER CYC. CORP. § 8854 (1987).

347. *See supra* part IV.A.5.

348. *See* ROTUNDA ET AL., CONSTITUTIONAL LAW, *supra* note 32, at 102. For an extensive review of the doctrine and historic development of the impairment of obligations of the Contract Clause, *see id.* at 86-104; Sunstein, *supra* note 220, at 1719-23.

349. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 768-71 (1945). *See also* Donald H. Reagan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); and the impermissible burden test under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).



place, and, in the special constellation of a tax regulation, the risk of multiple taxation is not increased.<sup>350</sup> Thus, under the Commerce Clause, too, discriminations are reviewed under a sort of strict scrutiny. However, the area of application of the Commerce Clause is confined to state discriminations against or within foreign commerce and interstate commerce. Excluded are federal discriminations and state discriminations within intrastate commerce.

### VIII. SUMMARY OF THE NEW STANDARD OF REVIEW

Foreign and alien corporations may invoke the non-discrimination clauses of the Equal Protection Clause, the Dormant Foreign and Interstate Commerce Clause, and the Impairment of Obligations of Contract Clause, but not the Privileges and Immunities Clause, which is a type of most-favored nation clause. According to the traditional concept, particularly that of the Supreme Court, a mere rational basis test is used under the Equal Protection Clause which upholds a legislative differentiation between foreign or alien and domestic corporations as constitutional, if the relation between criterion of differentiation and goal of differentiation is not arbitrary.

For differentiations between foreign or alien corporations and domestic corporations, this Article holds at least intermediate scrutiny review applicable, in some constellations possibly even strict scrutiny review. This follows consistently both from awarding differentiations on grounds of corporate nationality suspect classification status, triggering strict scrutiny, and from the application of the right to interstate migration and the right of access to courts to alien or foreign corporations under the fundamental rights branch of the Equal Protection Clause. Accordingly, a legislative differentiation conforms to the Equal Protection Clause only, if it serves important governmental objectives and is substantially related to achievement of those objectives.<sup>351</sup>

Also, under the Privileges and Immunities Clause, which merely protects fundamental activities, a somewhat stricter standard of review is applied, insofar, the classification of which as intermediate scrutiny or strict scrutiny is disputed. On the conflict of constitutional laws level, this constitutional

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350. *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1 (1986); *South Central Timber Developmental, Inc. v. Wunnicke*, 467 U.S. 82 (1984); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979); *Crutcher v. Kentucky*, 141 U.S. 47, 61 (1891); *Campeau Corp. v. Federated Dep't Stores*, 679 F.Supp. 735 (S.D. Ohio 1988). See also 15A AM. JUR. 2D *Commerce* § 24 (1976 & 1993 Supp.).

351. Application of intermediate scrutiny entails a shift of the burden of proof for the discriminative intent: if the plaintiff established *prima facie* evidence for discrimination, the state/government has to prove the lack of discriminative intent; see *supra* part II.C.

provision, however, may neither be invoked by foreign nor by alien corporations. The Impairment of Obligations of Contract Clause, on the one hand, is only applicable to alien and foreign corporations after admission to doing business in the state. On the other hand, despite its wording it has no absolute character according to traditional jurisprudence, but allows a justification under a standard of review similar to equal protection strict scrutiny. Under the Commerce Clause, too, differentiations are reviewed under a sort of strict scrutiny, although in substance restricted to state discriminations against and within foreign commerce and interstate commerce.

Thus, this kind of uniformity of a standard of review similar to strict, or at least, intermediate scrutiny under other provisions of the U.S. Constitution protecting or, according to their structure, possibly protecting foreign and alien corporations or, more generally, cross-border commercial activity, serves as a systematic argument for applying intermediate scrutiny under the Equal Protection Clause to legislative references to foreign or alien corporate nationality.

## IX. EXEMPLARY APPLICATION OF THE STANDARD OF REVIEW PROPOSED

This article will be rounded up by a practical application of the suggested equal protection doctrine for foreign and alien corporations. First, some typical justifications proffered for legislative discriminations shall be tested under the suggested equal protection standard of review. Second, exemplary discriminatory regulations for foreign and alien corporations shall be examined as well. A conclusive review is not at all intended.

### *A. Review of Typical Justifications for Discriminations Against Foreign/Alien Corporations*

#### 1. National Security

"National security" is often used as a justification of restrictions and discriminations against alien corporations. For instance, it is of critical importance in the Exon-Florio Amendment:<sup>352</sup> The President may prohibit or suspend an acquisition, merger or takeover of a person engaged in interstate

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352. Omnibus Trade and Competitiveness Act of 1988 § 5021, Pub. L. No. 100-418, 102 Stat. 1107, 1425 (1988), (codified in 50 U.S.C. § 2170 (West 1991 & 1993 Supp.)). See also Omnibus Trade and Competitiveness Act of 1988 § 301, 19 U.S.C. § 2411 (West Supp. 1993) ["Super-301"], in Judith H. Bello & Alan F. Holmer, *Unilateral Action to Open Foreign Markets: The Mechanics of Retaliation Exercises*, 22 INT'L LAW. 1197 (1988).

commerce in the United States which could result in foreign control of persons engaged in interstate commerce in the United States, if the transaction threatens to impair national security. The surveillance of and investigation into these transactions is mandated to the Committee on Foreign Investment in the United States (CFIUS), which will inform the President and submit proposals.<sup>353</sup>

It is feared that CFIUS may construe very broadly the key term of national security not defined by the statute itself, and thus, create a wide area of potential interference for the U.S. government. The notion of national security, then, would depend mainly on political considerations and fluctuate respective to the predominant political climate.<sup>354</sup> Furthermore, the wide interpretation in connection with the reporting proceedings might entail the danger that foreign investors consider almost all of their transactions potentially relevant and consequently submit them to CFIUS, so that the Exon-Florio Amendment might turn out as a de facto screening of foreign direct investment.<sup>355</sup> The hotly debated proposed rules to the Exon-Florio Amendment<sup>356</sup> do not define the notion of national security restrictively.

It is often pointed out that there is a danger that foreign investors might attempt to control certain sectors of industry in order to interfere with or harm the U.S. economy and in order to use this control to exert political pressure on U.S. government.<sup>357</sup> From a narrower perspective, most often the

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353. For details see GRAHAM & KRUGMAN, *supra* note 239 at 97-100; José E. Alvarez, *Political Protectionism and United States International Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VA. J. INT'L L. 1 (1990) Note, *Exon-Florio Amendment*, *supra* note 239, at 1209-23. For a current survey of the steps taken under Exon-Florio and its expansion by the 1992 Byrd-Exon Amendment see Patrick L. Schmidt, *The Exon-Florio Statute: How It Affects Foreign Investors and Lenders in the United States*, 27 INT'L LAW. 795 (1993).

354. In this context it is elucidating that the originally proposed version of the Exon-Florio Amendments not only contained potential impairments of national security, but also of essential commerce. See H.R.CONF.REP. NO. 576, 100th Cong., 2d Sess. 514, 925 (1988) *reprinted in* 1988 U.S.C.C.A.N. 1547.

355. For these concerns see GRAHAM & KRUGMAN, *supra* note 239, at 100; Note, *Exon-Florio Amendment*, *supra* note 239, at 1211-14, 1221-23 and 1248-54; see also Gerald T. Nowak, *Above All, Do No Harm: The Application of the Exon-Florio Amendment to Dual-Use Technologies*, 13 MICH. J. INT'L L. 1002 (1992).

356. Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 54 Fed.Reg. 29744 (1989) (to be codified at 31 C.F.R. pt. 800) (proposed July 14, 1989), 56 Fed.Reg. 58774 (1991) (final rule Nov. 21, 1991). See also Note, *Exon-Florio Amendment*, *supra* note 239, at 1209-19.

357. See Note, *The Rising Tide of Reverse Flow: Would a Legislative Breakwater Violate U.S. Treaty Commitments?*, 72 MICH. L. REV. 551, 556 (1974) [hereinafter Note, *Rising Tide*].

argument is based on the danger of sabotage or damage, particularly on the military sector and the sector of national defense.<sup>358</sup> The justification of national security is furthermore proffered for restrictions in certain key industries, such as radio communications, coastal and inland navigation, aviation above U.S. territory, as well as, production and use of nuclear energy.<sup>359</sup>

The Supreme Court once regarded this criterion in a different context as "a broad, vague generality."<sup>360</sup> When applying the rational basis test under the Equal Protection Clause, however, a rational relation between the protection of national security and the necessity to protect certain sectors of commerce and industry against alien control may be established, particularly when considering the wide discretion of the legislature under this standard of review.<sup>361</sup> On the other hand, when applying intermediate scrutiny as proposed in this article, two different situations have to be kept apart: the narrow field of national security and the much larger area of national interests.<sup>362</sup> National interests function, for instance, as justification for the surveillance of certain types of foreign investments in the U.S. by CFIUS.<sup>363</sup>

In my opinion, the objective of protection of national interests does not meet the requirements of the intensified standard of review under the Equal Protection Clause. It is already questionable whether the notion fulfills the qualitative requirements of a justification, since ultimately it is similar to the objective of differentiation of "protection against alien control"<sup>364</sup> in that it expresses pure protectionism, in which the goal of differentiation comes close to unadmissible congruence with the criterion of differentiation itself. In any case, it at least lacks the required rational relationship between the criterion of differentiation and the goal of differentiation, that is, it does not fulfill the requirement of proportionality. The notion of national interests is not cut precisely enough, it is not closely tailored to the specific subject matter regulated, and it seems over-inclusive. Furthermore, national interests may also be impaired by the activities of domestic corporations. The definition of the notion is simply subject to the arbitrariness of the executive branch.

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358. See Note, *Rising Tide*, *supra* note 357, at 556.

359. See Elliot L. Richardson, *United States Policy Toward Foreign Investment: We Can't Have It Both Ways*, 4 AM. U. J. INT'L L. & POL'Y. 281, 307-08 (1989).

360. *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J.). This famous decision is rooted in the freedom of speech context, where a stricter standard of review than the rational basis test reigns under the Equal Protection Clause.

361. See also Note, *Exon-Florio Amendment*, *supra* note 239, at 1234 (arguing for constitutionality of the Exon-Florio Amendment).

362. See, e.g., Richardson, *supra* note 353, at 307-08.

363. See Richardson, *supra* note 359, at 308.

364. See *infra* part IX.A.4.

The justification of national security, however, in principle satisfies the qualitative requirements of heightened scrutiny. When focusing on the close tailoring to the specific subject matter regulated this is evident, for instance, in a sensitive sector like the sector of nuclear energy.<sup>365</sup> But there are restrictions to be noted. First, the adequacy, fit, or necessity is doubtful, if in the concrete matter potential impairments of security also come from domestic corporations or from those domestic corporations that are exclusively or predominantly owned by alien natural persons and if these are not subject to surveillance and control in a similarly effective way. In this case, there is simply a direct and exclusive discrimination of alien persons under the epitaph of concerns for national security. Second, doubts can be raised as to the adequacy of this justification in sectors which have turned out to be an annex to the military industry during the world wars, such as merchant navigation.<sup>366</sup> It seems, however, more persuasive that the current situation of

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365. According to a discriminative provision of the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 (West 1973 & 1993 Supp.), the Nuclear Regulatory Commission (NRC) may not issue a license for production facilities using nuclear materials to "an alien or any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government." 42 U.S.C. § 2133(d) (West 1973 & 1993 Supp.) (footnote omitted); NRC, Domestic Licensing of Production and Utilization Facilities, 10 C.F.R. § 50.38 (1990). The provision is motivated by fears of a potential danger to national defense and national security as well as for public health and safety. See 42 U.S.C. §§ 2133(d) last sentence, 2134(d) (West 1973 & 1993 Supp.) ("In any event, no license may be issued . . . if . . . the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public."). See also *Siegel v. Atomic Energy Commission*, 400 F.2d 778, 781, 784 (D.C. Cir. 1968); NRC, Domestic Licensing of Production and Utilization Facilities, 10 C.F.R. § 50.40(c) (1990). See also *Federal Restrictions on Foreign Direct Investment in Energy Resources*, in *MANUAL OF FOREIGN INVESTMENT IN THE UNITED STATES* 429, at 437-40 (J. Eugene Marans & Jonathan J. Rusch eds., 1984 & 1991 Supp.); ROTH, *supra* note 292, at 170-72; Note, *Exon-Florio*, *supra* note 239, at 1191-92.

366. According to Merchant Marine Act of 1920 § 27, merchant vessels being operated between two points in the United States, directly or via a foreign port, must be owned by persons who are either U.S. citizens or U.S. corporations. Pub. L. No. 66-261, § 27, 41 Stat. 988, 999 (1921) (codified as amended at 46 U.S.C. § 883 (West Supp. 1993)). See also Paul G. Kirchner, *Federal Restrictions on Foreign Investment in the United States Maritime Industries*, in *MANUAL OF FOREIGN INVESTMENT IN THE UNITED STATES* 474, 478-82 (Eugene Marans et al. eds., 1984 & 1991 Supp.); Seitzinger, *supra* note 239, at 12-15; see also ROTH, *supra* note 292, at 159-65; Vagts, *supra* note 6, at 1497-1508. U.S. corporations controlled by alien persons are also excluded from this activity. 46 U.S.C. § 883-1 (West 1975 & 1993 Supp.). As to U.S. corporations controlled by alien persons see also the requirements of the Shipping Act

international security is so far from the state of war that maintaining the restrictions appears excessive and premature. Third, in order to pay regard to intermediate scrutiny the notion of security interests must be construed narrowly.<sup>367</sup> Therefore, it seems ideal when Art. XXI of the General Agreement on Tariffs and Trade [GATT]<sup>368</sup> permits a member state's deviation from the principles of national treatment and most-favored nation treatment only, if this is necessary for the protection of essential national security interests. If one takes into account that GATT obligations are considered more on the side of weak obligations, this tightened standard must a fortiori be given effect under the heightened scrutiny standard under the U.S. Equal Protection Clause.

## 2. Protection of Domestic Employees Against Unemployment

Sometimes it is suggested, as an objective of legislative restrictions against alien corporations, that U.S. employees must be protected against the possibility that the alien corporation liquidates its U.S. branches or affiliates, unscrupulously abandoning the U.S. citizens employed at these facilities to the fate of unemployment.<sup>369</sup>

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of 1916 § 2, 39 Stat. 728, 729 (1917), § 46 U.S.C. § 802 (West 1975 & 1993 Supp.). Seventy five per cent of the shares must be owned by U.S. persons and the president or chief executive officer as well as chairman of board of directors must be U.S. citizens. *Id.*

These regulations are motivated by concerns of "national security." They were introduced during or after World War I, when people had realized that during the time of war or a national emergency the merchant marine signifies an essential support of the navy, therefore alien control of the merchant fleet would present a threat to national security. See Kirchner *supra* at 475-76; Vagts, *supra* note 6, at 1504-07.

367. In an earlier piece I suggested a narrow understanding of this notion in the context of the nondiscrimination clauses of the EC Treaty and the applicable strict standard of review. See Hartwin Bungert, *Auswirkungen des EG-Beitritts Spaniens auf Grundstückserwerbsbeschränkungen für Ausländer im spanischen Recht [Consequences of Spain's Accession to the EC on Land Ownership Restrictions for Aliens in Spanish Law]*, 1990 RECHT DER INTERNATIONALEN WIRTSCHAFT ["LAW OF INTERNATIONAL COMMERCE," RIW] 461, 466-67 (1990).

368. Oct. 30, 1947, 61 Stat. (parts 5 & 6), T.I.A.S. No. 1700, 55 U.N.T.S. 187 (1950). See also Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 STAN. J. INT'L L. 479 (1990); John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249 (1968); Note, *United States Participation in the General Agreement on Tariffs and Trade*, 61 COLUM. L. REV. 505, 543-46 (1961).

369. See Note, *Rising Tide*, *supra* note 357, at 554-55, pointing at a respective statement of Representative Gaydos, 119 CONG. REC. H6891 (1973).

This goal of differentiation cannot withstand heightened equal protection scrutiny. The protection of domestic employees against unemployment may well be an important governmental objective, although already the restriction to "domestic" is precarious. In any case, however, its application does not comply with the proportionality principle, i.e., it is not narrowly tailored. The differentiation between U.S. and alien corporations in this respect could merely be upheld, if the underlying unspoken presupposition were correct, that alien corporations would or had to close their plants before U.S. corporations would do so. This presumption does not seem persuasive. On the one hand, larger investments in the United States will most certainly be carried out, particularly by multinational enterprises, which spend sufficient resources and planning to prevent short-time bankruptcies.<sup>370</sup> On the other hand, the basic problem may be overcome, if for alien corporations the provisions of social carry-over arrangements for employees are also put into force. Besides, smaller alien corporations will employ, to a large extent, employees of their country of origin, anyway.

### 3. Lack of Consent to U.S. Economic Policy

Some suggest that the interests of the alien corporation or of their country of origin may conflict with the goals of U.S. economic policy. Thus, for instance, it might turn out impossible for the U.S. government to persuade the management of an alien corporation to join in voluntary self-restrictions for price increases as the domestic enterprises of the sector would succumb to in the context of a sort of concerted action in an economic emergency situation. Furthermore, it is argued that an alien enterprise could refuse to participate in an U.S. embargo against a specific country with its U.S. business (production facilities, subsidiaries, branches) a somewhat unlikely instance.<sup>371</sup> However, due to the wide extraterritorial application of the Export Administration Act of 1979 and U.S. export controls generally, the direct and indirect enforcement powers of the U.S. government should reach far enough to enforce recognition of the U.S. embargo in the latter occurrence. Also, this argument can surely not generally justify all restrictions for alien corporations. For as a starting-point, it has to be kept in mind, on the one hand, that the U.S. Constitution is neutral as to economic policy. It does not prescribe a specific form of economic system and it also does not prohibit a specific one.<sup>372</sup> Consequently, by means of the Constitution, a specific

370. For a similar argument see Note, *Rising Tide*, *supra* note 357, at 555 n.19.

371. See the arguments made in Note, *Rising Tide*, *supra* note 357, at 555-56.

372. See RICHARD M. BUXBAUM, *Economic Law in the United States of America*, in BEGRIFF UND PRINZIPIEN DES WIRTSCHAFTSRECHTS—SIEBZEHN LANDESBERICHTE ZU EINEM INTERNATIONALEN SYMPOSIUM—[DEFINITION AND PRINCIPLES OF

economic system cannot be enforced. On the other hand, setting aside such situations of voluntary self-restriction, which are probably of little actual significance, there should be different ways to specifically enforce these economic policies without applying any form of discrimination, for instance, by respective formulations of government contracts or by trade-union agreements. Consequently, the argument of a lack of consensus on U.S. economic politics is no proper justification.

#### 4. General Protection Against Alien Control

Often a discrimination against alien corporations is allegedly founded upon a general protection against alien control. For instance, several state restrictions of land ownership by foreign or alien corporations are motivated by these considerations,<sup>373</sup> particularly the so-called family farm legislation in the states of the Upper Midwest Great Plains, simply strive to keep out foreigners.<sup>374</sup>

Already in *Graham v. Richardson*,<sup>375</sup> the Supreme Court refused to acknowledge the special public interest of preferable treatment of state citizens in allocating rare resources proffered for state discriminations against alien natural persons. The special public interest doctrine was held inapplicable due to the demise of the right-privilege distinction because of the close entanglement of both categories in modern legislation.<sup>376</sup> Also, fiscal considerations do not count as a compelling state interest.<sup>377</sup> However, this decision was made applying strict scrutiny, so that a compelling state interest was necessary.

Recently, the Supreme Court stated even under the rational basis test that an openly declared state policy to discriminate by the incriminated regulations against alien persons, particularly corporations, can never alone be a

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ECONOMIC LAW—SEVENTEEN NATIONAL REPORTS FOR AN INTERNATIONAL SYMPOSIUM] 11, at 12 (1971). Compare also *Lochner v. New York*, 198 U.S. 45 (1905).

373. See *infra* part IX.B.1; See generally Joshua Weisman, *Restrictions on the Acquisition of Land by Aliens*, 28 AM. J. COMP. L. 39 (1980), for techniques of alien land ownership restrictions.

374. See Morrison, *supra* note 230, at 636-37; e.g., IOWA CODE ANN. § 567.1(4) in connection with § 567.2 and § 567.3(1) (1993).

375. *Graham v. Richardson*, 403 U.S. 365 (1971).

376. *Graham*, 403 U.S. at 374. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420-21 (1948), refused to acknowledge the special public interest doctrine in connection with discriminations against aliens. For the right-privilege distinction see *supra* part III.A.2.

377. *Graham*, 403 U.S. at 374-75. See also *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).



reasonable justification for differentiated treatment.<sup>378</sup> Under the proposed intermediate scrutiny standard these situations lack an admissible goal of differentiation. It is simply not enough to offer the criterion of differentiation itself as the goal of differentiation. A differentiation simply and plainly because of alien nationality is unconstitutional. In the connotation of corporate nationality the general protection of domestic business actors against alien control is already comprised. This is the prototype of a suspect classification,<sup>379</sup> which Sunstein correctly calls a "naked preference."<sup>380</sup>

### 5. Protection of the Local Economy

Sometimes, protection of domestic economy as the counterpart of protection against alien control is put forward as justification for restrictions on alien corporate persons. In part, it is also suggested that only these restrictions can meet the interests of local consumers.<sup>381</sup> The argument of protecting the local economy is advanced with added weight in the context of soil, mineral and natural resources usage.<sup>382</sup>

In *Metropolitan Life Insurance Co. v. Ward*, a Supreme Court majority held, however, that the clamor for improvement of the local economy at the

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378. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 876-79 (1985); *Williams v. Vermont*, 472 U.S. 14, 23-24 (1985). See also ROTUNDA ET AL., CONSTITUTIONAL LAW, *supra* note 32, at 337-39; for an extensive elaboration on this principle in the various constitutional provisions protecting against discriminations see Sunstein, *supra* note 220, at 1689.

379. This is probably also alluded to by Tussman & tenBroeck, *supra* note 32, at 375. See also Note, *Taxing*, *supra* note 250, at 897-98, which requests a fair and substantial relation between the regulation and the intended legislative goal in cases of protection against alien control.

380. Sunstein, *supra* note 220, at 1689.

381. See, e.g., the dissent in *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 891-98 (1985) (O'Connor, J., dissenting).

382. Cf. the interesting comparison of the respective constitutional law of the U.S. and the EC [European Community] in Peter von Wilmowsky, *Zugang zu den Boden- und sonstigen Naturschätzen anderer Mitgliedstaaten: EWG-Vertrag und US-Verfassung im Vergleich* [Access to Mineral and Other Natural Resources of Other Member States: Comparing the EEC Treaty and the US Constitution], 54 RABELS-ZEITSCHRIFT [RABELSZ] 692 (1990). This justification is also sometimes used in the German law of restrictions and control of investment. Particularly the German Foreign Trade Law [Außenwirtschaftsgesetz, AWG] authorizes the enactment of executive directives for the protection of the economic territory against alien competition, although no such directives are in effect currently; see ECKART PUTZIER, DIE ERMÄCHTIGUNGEN DES AUßENWIRTSCHAFTSGESETZES [AUTHORIZATIONS OF THE GERMAN FOREIGN TRADE LAW] 115-17 (1987).

expense of foreign corporations alone does not serve as a legitimate state interest under the rational basis test.<sup>383</sup> On the contrary, the Supreme Court pointed out that a differentiation motivated by this presents the very parochial discrimination the Equal Protection Clause attempts to prevent.<sup>384</sup> In this area, the Equal Protection Clause is granted more bite than usual despite application of the weak rational basis test, because precisely the goal of discriminative state legislation predominantly used is prohibited.<sup>385</sup> However, it is doubtful, whether the Supreme Court will transfer this line of argument to alien corporations or whether this will be confined to foreign corporations, because there might be a particularly close relationship between the sister states.

This Article, however, proposes a uniform standard of review for discrimination against both foreign and alien corporations,<sup>386</sup> particularly because of the development insinuated in *Kentucky Finance Corp. v. Paramount Auto Exchange*.<sup>387</sup> Similarly *Bacchus Imports, Ltd. v. Dias*<sup>388</sup> in the context of discriminations under the Commerce Clause and its interplay with the Twenty-first Amendment, which lays out state power for the law of alcoholic beverages, coined the phrase: "State laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor."<sup>389</sup> The decision declared state regulations unconstitutional that solely presented economic protectionism. Congress may permit the individual state regulation of interstate commerce, otherwise precluded by the Commerce Clause.<sup>390</sup>

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383. *Metropolitan Life*, 470 U.S. at 876-79. See also 2 ROTUNDA ET AL., CONSTITUTIONAL LAW, *supra* note 32, at 337-38; Laycock, *supra* note 226, at 269.

384. *Metropolitan Life*, 470 U.S. at 878; Laycock, *supra* note 226, at 269. Justice Powell in a dissent in *Schweiker v. Wilson*, 450 U.S. 221, 244-45 (1981) (Powell, J., dissenting), had requested a fair and substantial relation between the differentiation and the pursued legislative goal as an intensification of the traditional view; see also Note, *Taxing*, *supra* note 250, at 897-98.

385. See also Laycock, *supra* note 226, at 269.

386. See *supra* part IV.C.6.

387. 262 U.S. 544 (1923). See *supra* part IV.A.4.

388. 468 U.S. 263 (1984).

389. *Id.* at 276. See also William Cohen, *Federalism in Equality Clothing: A Comment on Metropolitan Life Insurance Company v. Ward*, 38 STAN. L. REV. 1, 15 (1986).

390. See, e.g., *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652-53 (1981). In this case Congress was held to have explicitly set aside all restrictions of the Commerce Clause for the states in the McCarran-Ferguson Act. *Id.* See also Laycock, *supra* note 226, at 269.

Congress, however, may not permit a violation of the Equal Protection Clause by the individual state.<sup>391</sup>

According to this author's intermediate equal protection scrutiny, the justification of protection of domestic economy as well as its counterpart of protection against alien foreign control<sup>392</sup> has to be considered a violation of the Equal Protection Clause, since it is the prototype of a naked preference and equates the goal of differentiation with the connotation of the criterion of differentiation itself. Furthermore, the protective argument is also unproportional in this generality.

## 6. Protection of Domestic Legal Relations

At first sight the justification of the protection of domestic legal relations or domestic (contracting or third) parties seems to be closely related. Some restrictive regulations of alien corporations do not completely exclude them from a specific activity, but instead lay down additional obligations compared with domestic corporations that are designed for the protection of domestic legal transactions. These protective regulations are aimed to serve the interests of contracting or third parties. Examples are provisions for certain form requirements of firm letterheads<sup>393</sup> or stricter registration requirements for domestic branches of alien corporations.<sup>394</sup>

These regulations do not simply serve to protect against alien control motivated by protectionist ideas. Under a strict standard of equal protection review they will be upheld, because they protect an important state interest, that is third parties in the economic life, particularly consumers, which due to their weak position require special protection by the state. On the second level the regulations have also to fulfill the qualitative requirements of the

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391. See *Katzenbach v. Morgan*, 384 U.S. 641, 651-52 (1966); Laycock, *supra* note 226, at 269.

392. See *supra* part IX.A.4.

393. E.g., § 15(b) Para. 2 Gewerbeordnung [Industrial Code, GewO] requires alien corporations to use a firm letterhead containing the address of their office abroad and naming the persons acting with agency for the corporation when sending letters from an in-state branch. The statute aims at protection of in-state creditors and is particularly supposed to make clear that an alien corporation is dealt with which is organized under another law.

394. According to German Commercial Code §§ 13 et seq. [Handelsgesetzbuch, HGB] all branches of a corporation have to be registered with the commercial register. Due to German Commercial Code § 13d, domestic branches of alien corporations are insofar treated as domestic main offices. Consequently, these branches encounter a wider range of facts to be reported and a wider standard of review of the registering court. See also Dankwart Ensslin, *Taxation of Business Investment in the Federal Republic of Germany*, 36 CAN. TAX J. 176, 179 (1988).

relation of the criterion of differentiation to the goal of differentiation, i.e., to stand in a proper relation to each other and to not violate the principle of proportionality, which in particular requires a narrow range of application.

## 7. Protection of Certain Key Industries

Sometimes without precise arguments it is claimed that in specific industrial sectors alien persons' activities generally present potential danger for domestic interests, so that an unequal treatment of alien persons would be justified. As an example the manufacture of military weapons is suggested.<sup>395</sup> In this area, not only are restrictions on alien corporations held permitted, but restrictions of activities of domestic corporations with alien participation are also seen allowed.<sup>396</sup>

The fact alone that in specific industries additional or heightened restrictions for alien corporations exist, does not already violate constitutional equal protection. Under intensified equal protection scrutiny it is precisely acknowledged that justifications and the qualitative substantial requirements for justifications are to be closely tailored to the specific subject-matter. Therefore, a particularly accident-prone industrial sector or one needing intense protection of third parties may in principle require specific permits, participatory obligations or control powers. But these have to be closely tailored to the specific case asking whether the individual sector with its specific risks requires such a differentiating restriction. The mechanical argument that precisely this industry or this key sector needs a protection against alien control or, respectively, a special protection of domestic corporations at the expense of foreign and alien ones will usually present an unconstitutional goal of differentiation.

### *a. Example: Banking Industry*

In *Northeast Bancorp, Inc. v. Board of Governors*,<sup>397</sup> for example, the Supreme Court acknowledged the justification of protecting domestic banks and financial institutions against the acquisition of all shares or a controlling interest by foreign corporations against the preferred treatment of corporations

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395. See, e.g., WALTER WIELAND SCHMIDT, GRUNDRECHTE UND NATIONALITÄT JURISTISCHER PERSONEN—EINE UNTERSUCHUNG ÜBER DEN GRUNDRECHTSSCHUTZ INLÄNDISCHER UND AUSLÄNDISCHER JURISTISCHER PERSONEN IN DER BUNDESREPUBLIK DEUTSCHLAND [FUNDAMENTAL RIGHTS AND NATIONALITY OF JURIDICAL PERSONS—AN EXAMINATION OF FUNDAMENTAL RIGHTS PROTECTION FOR DOMESTIC AND ALIEN JURIDICAL PERSONS IN THE FEDERAL REPUBLIC OF GERMANY] 168 (1966).

396. See, e.g., SCHMIDT, *supra* note 395, at 168.

397. 472 U.S. 159 (1985).

of certain states, respectively under rational basis equal protection review. In this case the state regulation was seen to pursue goals other than simply discrimination against foreign competition, i.e., the interest of the state in controlling the local banking industry.<sup>398</sup>

This, however, raises the question of what makes the banking industry special as compared to other industries or economic sectors and consequently should permit a sort of protectionistic thinking. As opposed to the contrary decisions mentioned *supra* Part I.X.A.5, which denied the notion of general protection of domestic commerce its status as justification due to its "naked preference" character already under rational basis review, this decision might perhaps be explained by the Supreme Court's concept recognizing certain sensitive economic sectors, such as the banking sector, in which restrictions may be justified by a protective state interest under alleviated conditions. However, such a concept of creating sectors should be opposed under the intermediate scrutiny standard insofar, as mere considerations of protecting commerce and no other rationales, such as national security or specific technical dangers, play a role. Why should a *per se* discrimination against foreign and alien competition be regarded as a justification in certain sectors and not in others?

Nevertheless, behind the epitaph of protecting domestic banking business yet another, possibly recognizable goal could linger. The decision mentions that by the special lay-out of the challenged bank regulation the close relationship between the community of those who need a loan and those who want to give a loan was supposed to be strengthened.<sup>399</sup> Indeed, Massachusetts and Connecticut regulations awarded preferential treatment to banks of New England neighbor states. This reasoning might include the justification of protecting domestic legal transactions acknowledged,<sup>400</sup> which assumes special weight in the area of banking law. This is shown already by the fact that in every country the regulation of supervision of banks plays an important role.<sup>401</sup> However, in this case the concrete design of the regulation must be actually necessary and appropriate, particularly not excessively restrictive disproportionate, for the protection of domestic business transactions.

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398. *Id.* at 177-78. See also ROTUNDA ET AL., CONSTITUTIONAL LAW, *supra* note 32, at 339.

399. *Northeast Bancorp.*, 472 U.S. at 178.

400. *Supra* part IX.A.6.

401. See, e.g., MICHAEL GRUSON & RALPH REISNER, REGULATION OF FOREIGN BANKS—UNITED STATES AND INTERNATIONAL (1991 & 1993 Cum. Supp.).

*b. Example: Radio Communications*

In 1981 the unequal treatment of excluding aliens from responsible activity in the radio communications sector<sup>402</sup> was challenged.<sup>403</sup> The U.S. Court of Appeals for Seventh Circuit used the rational basis test under the Equal Protection Clause and held the restriction for alien corporations justified by the federal power to regulate immigration and naturalization law.<sup>404</sup> The problem whether the federal government could regulate and control the public media by a franchising system for radio frequencies to protect national interests was not discussed. It is clear, however, that the decision merely looks to alien natural persons, because only there the comprehensive federal power to regulate immigration and naturalization exists.<sup>405</sup> Therefore, for a similar challenge by an alien juridical person a different argument would have to be relied on, but in the current state of doctrine the outcome should predictably be the same, due to the reliance on the weak rational basis test.

According to the intensified standard of review pursued in this article, neither a per se discrimination on grounds of alien nationality nor a

402. The Communications Act of 1934, 47 U.S.C. §§ 151-613 (West 1991 & Supp. 1993), grants the Federal Communications Commission (FCC) discretion to decide upon the exclusion of alien participation in the field of radio communications. § 310(b) of the Communications Acts prohibits granting radio licenses for broadcasting of radio programs, for common carriers, for aeronautical en route radio and for aeronautical fixed radio to alien corporations, *id.* § 310(b)(2), and enables, furthermore, the exclusion of alien control of U.S. corporations in granting respective licenses, if the FCC considers a refusal or revocation of the license to serve the public interest, *id.* § 310(b)(4).

Similarly, alien persons may not own more than 20 per cent of the shares of Communications Satellite Corporation, 47 U.S.C. § 734(d) (West 1991 & 1993 Supp.). For a comprehensive overview of the restrictions on the sector of media and communications see David Morris Phillips & John C. Jost, *Foreign Investment in United States Communications*, in *MANUAL OF FOREIGN INVESTMENT IN THE UNITED STATES* 396 (Eugene Marans ed., 1984 & 1991 Supp.); Seitzinger, *supra* note 239, at 20.

403. 47 U.S.C. § 303(l) in its then valid version was on the stand. Today's version of 47 U.S.C. § 303(l) (West 1991 & 1993 Supp.) was defused in this respect. However, the current provision of 47 U.S.C. § 310(b) (West 1991 & 1993 Supp.) reflects parallels to the old version of § 303(l).

404. *Campos v. FCC*, 650 F.2d 890 (7th Cir. 1981).

405. The apparent deduction of substantive justification from a powers clause is somewhat irritating. Oddly enough, the precise reasonable objective proffered for the differentiation between national and alien natural persons is the national interest of the Federation to establish an incentive for aliens to apply for naturalization (or, respectively, putting the President into a bargaining position for the conclusion of international treaties); *Campos*, 650 F.2d at 894.

discrimination in order to protect national interests<sup>406</sup> is admissible. One could merely consider whether the protection of national security could justify a different treatment. The restrictions in the sector of radio communications according to their legislative history were designed to prevent alien activities against the U.S. in war times.<sup>407</sup> But in this context, it seems questionable whether the current situation of international security, particularly from the perspective of the U.S. in their relations with most countries, is not so far from a situation of war that maintaining the restriction would seem premature and over-reaching.<sup>408</sup> When observing proportionality, a general exclusion is probably not admissible, but only milder means such as the reservation of certain frequencies, control powers of the government, or short revocation time-limits towards alien persons. Solely to this extent the sector of radio communications may be viewed as a special or an especially sensitive sector.

### c. Example: Insurance Industry

In no other business branch are foreign corporations subjected to more detailed and restrictive regulations than foreign insurance companies.<sup>409</sup> In principle, this is once again an area in which the protection of domestic legal transactions permit special control regulation and restrictions.

The Supreme Court first held that insurance business does not establish commerce in the understanding of the Commerce Clause.<sup>410</sup> In *United States v. South-Eastern Underwriters Ass'n*<sup>411</sup> in 1944, the earlier holding was overruled and insurance was declared to be "commerce" in the sense of the Commerce Clause. In direct reaction Congress passed the McCarran-Ferguson Act, according to which the silence of Congress is not construed to prevent state regulation of insurance industry.<sup>412</sup> This new state power to regulate and tax the insurance industry was confirmed by the Supreme

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406. See *supra* part IX.A.1.

407. Data Transmission Co., 52 F.C.C.2d 439 (1975). The same view is taken in *Noe v. FCC*, 260 F.2d 739, 741-42 (D.C. Cir. 1958). See also ROTH, *supra* note 292, at 180-81, using the legislative materials to explain that the legislation was inspired by considerations of national security.

408. See *supra* part IX.A.1.

409. See also BEALE, FOREIGN CORPORATIONS, *supra* note 167, at 181.

410. See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1869) (Field, J.) ("Issuing a policy of insurance is not a transaction in commerce."). See also Note, *Congressional Consent to Discriminatory State Legislation*, 45 COLUM. L. REV. 927, 927-29 (1945) [hereinafter Note, *Congressional Consent*].

411. 322 U.S. 533 (1944).

412. 15 U.S.C. § 1011 (West 1976 & 1993 Supp.).

Court.<sup>413</sup> At the same time, the Court pointed out that the McCarran-Ferguson Act merely takes away competence restrictions of the Commerce Clause, but leaves untouched restrictions established by other constitutional prohibitions of discrimination, particularly by the Equal Protection Clause.<sup>414</sup> Consequently, the insurance industry, from an equal protection perspective, is not considered a special key sector allowing a weaker equal protection standard, not even under the influence of the Commerce Clause.

## 8. "Bounty" Theory

To justify discriminatory restrictions sometimes the so-called bounty-theory is advanced. According to this theory, the government is considered allowed to freely differentiate when providing public services and benefits.<sup>415</sup> A closer look reveals that the bounty theory is used in two different constellations: First, in the context of providing government services from government financial resources such as subsidies; and second, for the more extensive notion of benefits, particularly those granting state permits, concessions, or licenses. In this second category, however, the necessity of granting a benefit, in its wider understanding, is created in the first place by the logically prior establishment of a prohibition with the reservation on granting of permission. Consequently, a restriction may very often be rephrased as the denial of granting benefits. Particularly, when departing from the perspective that before qualification in the state of its doing business a foreign corporation is considered to be without rights,<sup>416</sup> every unconditional or conditional granting of rights can be simply called the partial granting of a "bounty." For this reason, a distinction of bounty-cases and "regular" restriction-cases seems problematic.

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413. In *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652-55 (1981) the Court held that the wording clarifies the legislator's intent to renounce the power lent by the commerce clause in regard to insurance industry. See comprehensively Lee R. Russ, Annotation, *Construction, Application, and Operation of State "Retaliatory" Statutes Imposing Special Taxes or Fees on Foreign Insurers Doing Business Within the State*, 30 A.L.R. 4th 873 (1984); Note, *Congressional Consent*, *supra* note 410, at 930-41.

414. *Western & S. Life Ins.*, 451 U.S. at 656-57.

415. As to the bounty theory see Vagts, *supra* note 6, at 1521-22.

416. See *supra* parts IV.A.5, IV.C.3.a-b.



## 9. Requirement of Reciprocity

In *Hampton v. Mow Sun Wong*,<sup>417</sup> the Supreme Court indirectly acknowledged the argument of reciprocity, when it considered the governmental goal to exclude aliens from certain rights in order to retain the U.S. government's power to bargain for equal conditions for U.S. citizens abroad in international treaties with foreign nations, thereby using the pressure of the reciprocity requirement, as a principally valid justification under the Equal Protection Clause.<sup>418</sup> In the special context of foreign corporations in *Wheeling Steel Corp. v. Glander*,<sup>419</sup> on the contrary, under the rational basis test a state regulation was held to violate the Equal Protection Clause that sought to establish a system of reciprocity for state tax legislation patterns.<sup>420</sup> However, in this case the criterion of reciprocity itself was probably not refused, but merely its function or feasibility in the differentiation used was doubted. This is particularly elucidated by the fact that no other state responded to the taxation system of Ohio challenged in this case.<sup>421</sup>

A restriction based on reciprocity probably will rank very low on a graph of intensity of discriminatory restrictions for alien corporations. For in this constellation at least the alien government has the potential of positively influencing the restriction, even if the individual alien person concerned cannot. Thus, this presents a less intensive restriction than an unconditional exclusion of alien persons from a certain benefit or potential activity and, particularly, less restrictive than an absolute discriminative burden. Still, the requirement of reciprocity cannot be acknowledged as a justification for unequal treatment generally. According to some, the reciprocity requirement is founded upon an understanding of state sovereignty which is no longer accurate and up-to-date due to the actual transnational interpenetration. Today, the minimum standard for aliens in customary international law already grants legal positions by itself which formerly were granted by reciprocity agreements.<sup>422</sup> It is certainly true that the minimum standard for aliens guaranteed in customary international law<sup>423</sup> may no longer be reformulated

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417. 426 U.S. 88 (1976).

418. *Id.* at 102-04, 116.

419. 337 U.S. 562 (1949).

420. *Id.* at 572-74.

421. *Id.* at 574.

422. See, e.g., Hans-Uwe Erichsen, Höchstrichterliche Rechtsprechung zum Verwaltungsrecht I, 62 VERWALTUNGSARCHIV [VerwArch] 181, 188 (1971).

423. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 711 reporters' note 1 (1986); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 598-600 (4th ed. 1990); see comprehensively Richard B. Lillich, *Duties of States Regarding the Civil Rights of Aliens*, 161 REC. DES. COURS. 329 (1978-III).

and equipped with certain conditions in the national legislation. However, under the international law perspective, rights and guarantees beyond this standard are still within the disposition of the national state.

Establishing a reciprocity restriction probably has to be classified not as a denial of rights with a potential exemption, but as a conditional granting of rights. It is motivated by accomplishing optimal protection for the state's own national persons abroad. Even if on first glance a certain affinity to protectionism seems to shine through, which has been denied justification status in this Article,<sup>424</sup> the reciprocity criterion probably has to be recognized as an important governmental goal under an intensified standard of equal protection review. On the one hand, the protection of national persons in another country is at stake, and, on the other hand, ultimately the realization of a liberal world economy, either directly by rights guaranteed to alien persons in national law unrestrictedly or on a reciprocity basis, or indirectly in concluding respective bi- or multinational international treaties. However, in these instances, the proportionality standard must be closely observed. For instance, attempting to force another country to establish a regulatory system corresponding to one's own regulatory structure and connecting factors in a certain area of law, e.g., corporate income tax law, by use of the reciprocity scheme is not permitted.<sup>425</sup> Furthermore, the introduction of a reciprocity reservation is not permitted, if the pawn used does not stand in fit, necessary and appropriate, i.e., proportional relation to the specific right of the alien state striven for.<sup>426</sup> It is, for instance, disproportionate to exclude alien persons from all or a large part of economically relevant rights, only in order to achieve for one's own nationals rights, so specific as mining rights on the continental shelf of the respective country. Furthermore, certainly a strict connexity between the right retained by the reciprocity reservation and the right striven for in the other country must exist.

This evidences that restrictions for alien corporations which are conditioned upon reciprocity, narrowly tailored, and consequently satisfy the proportionality standard, cannot be overcome even by the intensified equal protection standard of review developed in this Article, but depend on non-discrimination clauses in international or supranational treaties.<sup>427</sup>

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424. See *supra* parts IX.A.5, IX.A.4.

425. See the constellation in *Wheeling Steel*, 337 U.S. at 562.

426. See, e.g., the constellation of the decision of the German Federal Constitutional Court [Bundesverfassungsgericht] of March 20, 1979, 51 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [Official Collection of the German Federal Constitutional Court's Decisions; BVerfGE] 1.

427. A comprehensive treatment of these clauses applicable for German and U.S. corporations is provided in HARTWIN BUNGERT, *ALIEN CORPORATIONS*, *supra* note 23, chapters 13 and 14.

## 10. Formal Disclosure, Report and Permit Requirements

Recently, duties of disclosure and reporting have increased considerably. One has only to mention, for instance, the obligations under the Foreign Bank Supervision Enhancement Act of 1991 (FBSEA) for foreign banks,<sup>428</sup> the obligations in the context of intercompany transfer pricing,<sup>429</sup> or regulations in filling out I.R.C. §§ 6038A and 6038C.<sup>430</sup> At first, one might be inclined

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428. Pub. Law No. 102-242, 105 Stat. 2286-2305 (1991) [Title II, Subtitle A of the Federal Deposit Insurance Corporation Improvement Act of 1991], considerably intensifying the supervisory powers of the Federal Reserve Board and the subsequent obligations of foreign banks. See GRUSON & REISNER, *supra* note 401; Daniel B. Gail et al., *The Foreign Bank Supervision Act of 1991: Expanding the Umbrella of "Supervisory Reregulation"*, 26 INT'L LAW. 993 (1992); Michael Gruson, *Foreign Banks Are No Longer Welcome in the United States*, 10 BANKING POL'Y REP. 5 (Dec. 1991 No. 23); Robert E. Hand, *How Foreign Banks in the United States Are Dealing with the Changing Legal and Supervisory Environment*, 26 INT'L LAW. 1015 (1992); Michael L. Whitener, *New Federal Reserve Board Regulations Regarding Foreign Banks in the United States*, 26 INT'L LAW. 1007 (1992).

429. Intercompany Transfer Pricing and Cost Sharing Regulations Under Section 482, 57 Fed. Reg. 3571 (January 30, 1992). See Richard G. Minor, *The New US Transfer Pricing Developments*, 3 EUROPÄISCHES WIRTSCHAFTS- UND STEUERRECHT [EUROPEAN BUSINESS AND TAX LAW, EWS] 14 (1992); Richard G. Minor, *Der Richtlinienentwurf der US-Finanzverwaltung zu Verrechnungspreisen* [The Proposed IRS Regulations for Transfer Pricing], 3 EWS 174 (1992).

Up to now the IRS accepted transactions between related enterprises conveying intangible property, if they corresponded to the agreements that independent enterprises would have formed under the same circumstances. Now considerable modifications are made. For intangible property in particular three new pricing methods are introduced: matching transactions method, comparable adjustable transaction method, and comparable profit method. Characteristic is the introduction of a so-called comparable profit interval. Accordingly, a transfer price will be corrected if it lies outside the profit interval, which is established by attributing the enterprise to the respective branch. Furthermore, the acknowledgement of the arm's length principle now requires maintaining a business form that independent third parties would have chosen under the same circumstances, thereby impairing the autonomy of the entrepreneur's decision.

430. 26 U.S.C. § 6038A and § 6038C (West 1989 & 1993 Supp.). See also Minor, *supra* note 429, at 15-23 (1992); Angelo A. Paparelli et al., *The Quasar Case: Hidden Problems of Employment, Immigration, and Tax Law*, 26 INT'L LAW. 1037, 1072-73 (1992). These regulations established reporting duties for U.S. corporations controlled by alien shareholders (a so-called reporting corporation is assumed, if 25 per cent or more shares are in the hands of alien shareholders) and for alien corporations with U.S. subsidiaries. From now on these are subject to comprehensive and detailed obligations of reporting, maintaining and furnishing records to the IRS the non-

to dismiss merely formal requirements as negligible forms of unequal treatment which do not run up to the degree of intensity of a discrimination. However, the increased administrative work and paper load going hand-in-hand with the obligations may lead to considerable additional costs. Also, the disclosure duties may entail a softening-up of the protection of business secrets. Due to these corollaries, formal requirements merely imposed on alien corporations may also present potential forbidden discriminations. Therefore, in each individual case, one has to examine whether according to the intensified qualifications of a justification under the intermediate standard of equal protection review the formal requirements presenting a different treatment of domestic and alien corporations attempt to achieve important governmental goals closely tailored to the specific subject-matter in principle, and whether in the individual case the extent and expenditure evoked by the formal control requirements are fit, necessary and appropriate for the achievement of the goal.

On the other hand, establishing a differentiating general permit requirement, i.e., only applying to alien corporations not motivated by specific dangers closely tailored to the individual subject-matter or important state interests, particularly one where granting the permit stands in the unspecified discretion of an administrative agency, seems to be unconstitutional, since it lacks both a recognizable justification and, due to its over-inclusiveness, a proportionate relation between means and end.

### *B. Review of Exemplary Statutory Provisions Restricting Alien or Foreign Corporations*

After having examined some prototype justifications commonly thought to support statutory unequal treatment of alien or foreign corporations, finally, some exemplary statutory discriminatory provisions shall be considered both under the traditional standard of review and the new standard developed in this Article.

#### **1. Restrictions on Land Transfer**

In a 1923 decision, the Supreme Court decided that a state statute excluding certain resident aliens from ownership of agricultural land was constitutional absent international treaty obligations, because the state has a special public interest in regulating the use of state territory.<sup>431</sup> This decision, however, was rendered long before the *vole-face* in *Graham v.*

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compliance of which results in severe fines.

431. *Terrace v. Thompson*, 263 U.S. 197 (1923). *See also Shames v. Nebraska*, 323 F. Supp. 1321 (D. Neb. 1971).

*Richardson* in 1971.<sup>432</sup> Nowadays, similar statutes will probably be reviewed under strict scrutiny for state discrimination of alien natural persons initiated in that decision, and it seems rather improbable that these state regulations are justified by a compelling fundamental state interest and are necessary for the realization of that interest.<sup>433</sup>

According to the development of the Supreme Court's equal protection doctrine as to natural alien persons, today it seems to be established that state alien land ownership restrictions<sup>434</sup> concerning resident aliens violate the Equal Protection Clause, because, first, under the perspective of the fundamental rights branch of equal protection doctrine land ownership is the basis for making a living for resident aliens and, second, alien persons with permanent residence in the U.S. are equivalent to U.S. citizens in this respect so that a suspect classification is at stake.<sup>435</sup> For nonresident aliens, on the other hand, land ownership restrictions are not considered to violate the Equal Protection Clause. A suspect classification is not assumed, because nonresident aliens are not viewed as an isolated minority, since they are

432. See *supra* part III.A.2.

433. See also *BERGER & MCCONNELL*, *supra* note 133, at 8-9. In *Graham* itself not only *Terrace*, but also several other older decisions concerning restrictions on alien land ownership are expressly called in question. *Graham*, 403 U.S. at 373-75.

434. Several states prohibit or restrict land acquisition by corporations that are owned by aliens, are controlled by aliens or are organized under alien law. Three different types dominate: (1) complete prohibition of acquisition of agricultural land, e.g., IOWA CODE ANN. § 567.1(4) in connection with § 567.2 and § 567.3(1) (1991); (2) restrictions on the total amount of acres which can be owned by alien persons, e.g., S.C. CODE ANN. §§ 27-13-10, -30, -40 (1991); (3) complete prohibition of land ownership of any kind by alien persons, e.g., 60 OKLA.STAT. §§ 121-127 (1991) and OKLA. CONST. art. XXII § 1 (1991). For foreign and alien corporations, however, OKLA. CONST. art. XXII § 2 (1991) allows at least acquisition of land necessary for office or business premises. See generally Lester M. Bliwise, *Legal Aspects of U.S. Real Estate Development and Construction*, in *FOREIGN INVESTMENT IN THE UNITED STATES—LAW, TAXATION, FINANCE* 517, 518 (Marc M. Levey ed., 1989); Hugh A. Brodkey, *Restrictions on Foreign Investment in Real Property*, in *MANUAL OF FOREIGN INVESTMENT IN THE UNITED STATES* 500, 501-05 and the list at 508-36 (Eugene J. Marans ed., 1984 & 1991 Supp.); Morrison, *supra* note 230, at 634-36; Louie B. Barnes, III, Comment, *Corporate Aliens*, *supra* note 310; Note, *State Regulation of Foreign Investment*, 9 CORNELL INT'L L.J. 82, 86-87 (1975).

435. See Morrison, *supra* note 230, at 642. Similarly *Oyama v. California*, 332 U.S. 633 (1948), where, however, the criterion of differentiation on grounds of national origin plays an important role, see also Tussman & tenBroeck, *supra* note 32, at 359 and 374-75. Furthermore, the legislative power of the states is drawn into doubt, because the Federation has the legislative power in the field of foreign relations and foreign commerce, at least after it has exerted it or preempted the field. See *Hines v. Davidowitz*, 312 U.S. 52, 70 (1941); Morrison, *supra* note 230, at 646-56.

granted diplomatic protection by their home country. Under the applicable rational basis test, the state interest in excluding aliens from economic control within the state is presumed to stand in a rational relation to the land ownership restriction for aliens.<sup>436</sup> In the few existing treatments in literature, alien corporations are put into the same category of weakly protected nonresident aliens without any arguments.<sup>437</sup>

When applying the intermediate standard of review proposed in this article to land ownership restrictions for alien corporations, these restrictions can only be justified, if they serve an important governmental goal of differentiation, and if a proportionate relation between the differentiation used and the goal of differentiation exists. Consequently, a differentiated approach seems to be called for. An ownership restriction in order to prevent land speculation, to preserve agricultural land, or to protect certain military or strategic zones certainly is in principle permissible, although, additionally, the proportionality of the respective regulatory framework has to be examined. An ownership restriction merely motivated by preventing each and every economic influence of alien corporations,<sup>438</sup> on the other hand, violates the qualitative requirements of the goal of differentiation. A comprehensive prohibition of land ownership appears to be always disproportionate and overreaching, since alien corporations have to be at least permitted to acquire office or business premises, because otherwise the land ownership restrictions practically amount to an exclusion of alien corporations from interstate business activities, particularly if the ownership prohibition is additionally extended to domestic corporations controlled by alien shareholders. Thus, for instance the Constitution of Oklahoma,<sup>439</sup> a state in principle especially restrictive towards land acquisition by aliens and alien corporations, permits foreign and alien corporations at least the acquisition of land required for conducting their business.<sup>440</sup>

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436. See Morrison, *supra* note 230, at 643.

437. Morrison, *supra* note 230, at 644.

438. See the argument made by Morrison, *supra* note 230, at 643.

439. OKLA. CONST. art. XXII, § 2 (1991).

440. For a comprehensive treatment of the respective Oklahoma law see Comment, *Corporate Aliens*, *supra* note 310. Furthermore, the Oklahoma Supreme Court held in *State ex rel. Cartwright v. Hillcrest Inv. Ltd.*, 630 P.2d 1253 (Okla. 1981), that an alien corporation that fulfilled the preconditions of domestication (see *infra* part X.B.5) is considered a resident of the state and consequently no longer subject to the restrictions of OKLA. CONST. art. XXII § 1 and § 2 (1991), i.e., could unrestrictedly acquire land.

## 2. Qualification Statutes

### a. Commerce Clause

For examining the constitutionality of a state foreign corporation law or qualification statute<sup>441</sup> under the Commerce Clause, Walker applies the balance of interests test used in *Southern Pacific Co. v. Arizona*.<sup>442</sup> He argues that the national interest in an optimal development of trade and commerce, which is strongly impaired by the costs incurred by a foreign corporation in fulfilling the formal requirements of qualification, clearly outweighs the purpose of the foreign corporation laws to provide a forum for suits against foreign corporations, which due to the modern developments of the notion of court's jurisdiction is provided in another way. Thus, according to Walker, the foreign corporation laws violate the Commerce Clause.<sup>443</sup> However, this argument should only work out for foreign corporations, and not for alien ones. As to them, there is probably no predominant interest in an optimal development of alien trade, although that might have positive influences on U.S. trade.

According to the Supreme Court, a qualification statute violates the interstate Commerce Clause and is unconstitutional as a restriction of interstate commerce, if it seeks to be applied to foreign corporations that do not regularly have business activities within the state, but the intrastate business activities of which are merely "fleeting events" in an interstate business transaction.<sup>444</sup> Since the Commerce Clause is in principle also applied in favor of alien corporations,<sup>445</sup> this line of argument, in my view, could analogously also be used for alien corporations.

### b. Equal Protection Clause

The Equal Protection Clause is hardly discussed with regard to qualification statutes. On the one hand, this is because, according to traditional doctrine, only the weak rational basis test would be applied to this

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441. These statutes are defined and discussed *supra* part IV.C.3.a.

442. 325 U.S. 761, 770-71 (1945).

443. Walker, *supra* note 290, at 755-57 and 759-70. For the compliance of qualification statutes or their definition of doing business, respectively, with the Commerce Clause *see also* Stenger & Gwyn, *supra* note 292, at 717-20.

444. *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974). *See also* Stenger & Gwyn, *supra* note 292, at 717-18, and comprehensively Harold W. Horowitz, *The Commerce Clause as a Limitation on State Choice-of-Law Doctrine*, 84 HARV. L. REV. 806, 819-20 (1971).

445. *See supra* text accompanying note 206 *et seq.*

type of economic regulation.<sup>446</sup> On the other hand, the question is anyhow only discussed with foreign corporations in view, so that the Commerce Clause seems to lie closer and, above all, to be stricter.

Under the intermediate scrutiny standard suggested in this article the goal of differentiation to protect domestic legal relations, particularly to provide an in-state forum to sue, in principle meets the qualitative standards for a justification. A conclusive evaluation as to the necessity under the perspective of the strict proportionality review, however, is hard to make at present. The necessity of qualification statutes should be lacking, if those voices gain field which see the purpose of qualification statutes in establishing in-state jurisdiction overtaken by the modern long arm statutes<sup>447</sup> and which hold the notion of doing business overruled by the Supreme Court's holdings<sup>448</sup> to the minimum contacts requirement of the Due Process Clause.<sup>449</sup>

### 3. State Pseudo-Foreign Corporations Statutes

#### a. Commerce Clause

State pseudo-foreign corporation statutes,<sup>450</sup> which declare applicable

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446. See also Richard M. Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 CAL. L. REV. 29, 41 (1987).

447. See LEFLAR ET AL., *supra* note 11, at 717-18; Stenger & Gwyn, *supra* note 292, at 717; Walker, *supra* note 290, at 738-41; Note, *Defining State Control*, *supra* note 290, at 1137-41.

448. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Cf. SCOLES & HAY, *supra* note 11, at 294-308 and 327-49. See also *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984).

449. See, e.g., Stenger & Gwyn, *supra* note 292, at 717. Cf. Comment, *Federal Jurisdiction Over Foreign Corporations and the Erie Doctrine*, 64 COLUM. L. REV. 685 (1964), suggesting a uniform federal standard for minimum contacts necessary for establishing doing business.

450. These statutes are sometimes also called "outreach statutes," see, e.g., LEFLAR ET AL., *supra* note 11, at 708; P. John Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1, 66-69.

For extensive discussions see LEFLAR ET AL., *supra* note 11, at 707-09; Deborah A. DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 LAW & CONTEMP. PROBS. 161, 166 (1985); Kaplan, *supra* note 195, at 442-81; Elvin R. Latty, *Pseudo-Foreign Corporation*, 65 YALE L.J. 137, 144-45 and 150-55 (1956); Louis Loss, *The Conflict of Laws and the Blue Sky Laws*, 71 HARV. L. REV. 209, 216-41 (1958); J. Thomas Oldham, *California Regulates Pseudo-Foreign Corporations—Trampling Upon the Tramp?*, 17 SANTA CLARA L. REV. 85, 98-110 (1977); John H. Newman, Note, *The Pseudo-Foreign Corporation in California*, 28



the laws of the state of predominant business activities to the internal affairs of the foreign corporation, particularly the California provision of Cal. Corp. Code § 2115,<sup>451</sup> are considered by some to violate the interstate Commerce Clause. When applying the direct/indirect onerous (undue) burden analysis,<sup>452</sup> some argue that there is a preponderance of the burdens as to the local benefits due to the inherent extraterritorial corollaries and due to the high costs for the corporations provoked by the collision of the regime of the incorporation state and the state of doing business.<sup>453</sup> On the other hand, Henn & Alexander deny a violation of the Commerce Clause by outreach statutes. As far as the law of the incorporation state and the law of the state of doing business are identical in substance, there is no conflict. If the statutes differ, there is also no burden, it is argued, because California law follows the incorporation rule, so that there will be no cumulation of differing laws.<sup>454</sup> Similarly, the California Court of Appeals, in the well-known *Wilson v. Louisiana Pacific-Resources, Inc.*<sup>455</sup> decision, denied a violation of the Commerce Clause by the Californian provision.<sup>456</sup> It could be

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HASTINGS L.J. 119 (1976); Andrew J. Collins, Comment, *Choice of Corporate Domicile: California or Delaware?*, 13 U.S.F. L. REV. 103 (1979).

451. CAL. CORP. CODE § 2115 (West 1993).

452. For this analysis under the commerce clause see *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945); NOWAK & ROTUNDA, CONSTITUTIONAL LAW, *supra* note 57, at 274-88. In these cases, the court used a balancing test between the State interests and the benefit of national unity.

453. See DeMott, *supra* note 450, at 183-90; Stephen R. Ginger, *Regulation of Quasi-Foreign Corporations in California: Reflections on Section 2115 After Wilson v. Louisiana-Pacific Resources, Inc.*, 14 SW. U. L. REV. 665, 672-83 (1984); Comment, *California's Statutory Attempt*, *supra* note 228, at 952-65. As to the comprehensive field see Oldham, *supra* note 450, at 207-32, who in balancing burdens versus benefits considers application of pseudo-foreign corporation laws in the individual case unconstitutional for a transitional period. He, however, denies a violation of the Commerce Clause for that point of time at which pseudo-foreign corporation laws will be established as an exemption from the internal affairs doctrine, because due to the acceptance and the subsequent adaptation of the corporation to the provisions, a significant burden will no longer be present. The provisions do not intend a preferential treatment of local commerce, but want to prevent distortions of competition and misuse, *id.* at 220.

454. HENN & ALEXANDER, *supra* note 10, at 223. For an evaluation under constitutional law see also Beveridge, *supra* note 254, at 709-19.

455. 138 Cal.App. 3d 216 (1982).

456. *Id.*, at 858-61. A violation of the Commerce Clause is also strongly doubted by Oldham, *supra* note 450, at 121-23, whose interest balancing results are the opposite of those stated above. See also Kozyris, *supra* note 450, at 57-60. In the unpublished decision of *Louart v. Arden Mayfair*, No. C-192-091 (Sup.Ct. of Los

necessary in any case to consider that the laws protecting shareholders declared applicable do not only intend to protect instate (Californian) shareholders, but all shareholders of the corporation and that the legislative power of the state as to an ultimately out-of-state corporation could be doubtful.

Currently, a general insecurity predominates as to which consequences to draw from the anti-takeover statute decision, *CTS Corp. v. Dynamics Corp. of America*,<sup>457</sup> with its emphasis on the incorporation rule for constitutional review of pseudo-foreign corporations statutes under the Commerce Clause.<sup>458</sup> It could be necessary to distinguish between quasi-foreign corporation statutes and pseudo-foreign corporation statutes.<sup>459</sup> The concrete design of the individual regulation seems to play an important role.

### *b. Full Faith and Credit Clause*

Some deny a violation of the Full Faith and Credit Clause by a state, if it, as the state of doing business, compulsory applies its laws to the internal affairs of a foreign corporation, as long as there are substantial contacts to the state of doing business.<sup>460</sup> In this case, the interest of the state in applying its local laws, it is argued, cannot be denied, because just this is made the requirement within the statutes.<sup>461</sup> In *Wilson v. Louisiana Pacific-Resources*,

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Angeles County, May 1, 1978), cited according to Kozyris, *supra* note 450, at 58, however, § 2115 was held to violate the Commerce Clause and the Full Faith and Credit Clause.

457. 481 U.S. 69 (1987). *See also immediately supra* part IX.B.3.a.

458. Persuasively opting for constitutionality, particularly as far as there are predominant contacts with the state for doing business, e.g., Beveridge, *supra* note 254, at 713-14; *see also* SCOLES & HAY, *supra* note 11, at 925 (hesitating, but at the same time differentiating). In more detail the different constellations and constitutional problems are treated, e.g., by Buxbaum, *supra* note 446 and Paul N. Cox, *The Constitutional "Dynamics" of the Internal Affairs Rule*, 13 J. CORP. L. 317 (1988).

459. This might be what also SCOLES & HAY, *supra* note 11, at 925, want to suggest. A pseudo-foreign corporation is defined as doing practically all its business in one state while being merely incorporated in another state. A quasi-foreign corporation does business in several states, but also is simply incorporated in its home state without doing any business there. *See* Kaplan, *supra* note 195, at 438-39.

460. Kaplan, *supra* note 195, at 446-49. *See also* DeMott, *supra* note 450, at 190-97; Oldham, *supra* note 450, at 192-206; William L.M. Reese & Edmund M. Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 COLUM. L. REV. 1118, 1129-44 (1958).

461. *See* Latty, *supra* note 450, at 164-65. *See also* THOMAS LUCHSINGER, DIE NIEDERLASSUNGSFREIHEIT DER KAPITALGESELLSCHAFTEN IN DER EG, DEN USA UND DER SCHWEIZ 244-45 (1992), who at least for the Californian case, Western Airlines,

*Inc.*, a violation of the Full Faith and Credit clause by the Californian statute was denied.<sup>462</sup>

### *c. Equal Protection Clause*

Some hold the California pseudo-foreign corporation statute Cal. Corp. Code § 2115<sup>463</sup> to violate the Equal Protection Clause.<sup>464</sup> Under the rational basis standard, the violation is seen, first, in the lack of a pertinent reason for treating corporations with substantial interstate business activities and shareholders spread out in the whole country the same as so-called tramp corporations that conduct all their business activities in California though incorporated elsewhere.<sup>465</sup> Furthermore, a violation is seen in § 2115(e), according to which corporations admitted to recognized national stock exchanges do not have to perform all the protections for shareholders as § 2115(b) provides for the group of foreign corporations in the sense of § 2115(a). Within the class of foreign corporations, therefore, a specific exemption class is seen to be created, which is grounded on criteria of differentiation that do not possess a rational relationship to the legislative goals of shareholder and creditor protection in § 2115.<sup>466</sup>

Henn & Alexander, by contrast, see no violation of the Equal Protection Clause in outreach statutes, particularly the California one. According to the state, they argue, foreign corporations are not treated differently from domestic corporations. On the contrary, an inequality previously existing at the cost of the foreign corporation is compensated.<sup>467</sup> Also, *Wilson v. Louisiana Pacific-Resources, Inc.*,<sup>468</sup> denied a violation of the Equal Protection Clause by the California Statute in emphasizing the applicability of the weak rational basis test, although the court limited its opinion to the question of the non-applicability of the California outreach statute to foreign corporations admitted to recognized national stock exchanges.<sup>469</sup> As far as I can see, there is as

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*Inc. v. Sobieski*, 12 Cal. Rptr. 719 (Cal. Ct. App. 1961), sees a violation of the Full Faith and Credit Clause in interplay with the Commerce Clause, according to the standards set up by the Supreme Court in *Edgar v. MITE*, 451 U.S. 624 (1982), and *CTS Corp.*, 481 U.S. at 262.

462. 187 Cal. Rptr. 852, 856-58 (Cal. Ct. App. 1982).

463. CAL. CORP. CODE § 2115 (West 1993).

464. Comment, *California's Statutory Attempt*, *supra* note 228, at 961-63.

465. *Id.* at 962-63.

466. *Id.* at 961-62.

467. HENN & ALEXANDER, *supra* note 10, at 224. See also Latty, *supra* note 450, at 163 (appearing to deny a violation).

468. 187 Cal. Rptr. 852 (Cal. Ct. App. 1982).

469. *Id.* at 862-63.

yet no Supreme Court opinion on a state outreach statute for pseudo-foreign or quasi-foreign corporations.

Due to its restricted scope, this article cannot provide the required extensive debate of the constitutional problems of outreach statutes and, in particular, attend to the guidelines of *CTS Corp. v. Dynamics Corp. of America*, especially because the design details of the individual concrete statutes are decisive. In any case, it must be paid attention to the additional difficulty comprised in an equal protection challenge of a conflict of laws statute as opposed to the laws of substantial rules discussed so far.

#### 4. Domestication Statutes

It seems doubtful whether facultative domestication statutes,<sup>470</sup> per se, can technically be labelled discrimination. Regularly, this proceeding is laid out merely as an additional option for alien corporations doing business in the state, apart from qualification, and therefore creates an additional possibility in the sense of a "theory of offerings." A domiciled alien corporation is treated like a domestic corporation in the state corporate law, and, in order to observe the requirements of the Interstate Commerce Clause, only in regard to its intrastate activities.<sup>471</sup> Thus, facultative domestication is structured as a means to establish equal treatment or at least to come closer to it. The alien corporation is granted the possibility to acquire a (at least predominantly) non-discriminatory status by a mere procedural act.<sup>472</sup> Thus, in *State ex rel. Cartwright v. Hillcrest Investments Ltd.*<sup>473</sup> an alien corporation after domestication was considered a state resident and consequently excluded from state land ownership restrictions for alien corporations.

A different evaluation might be required for compulsive domestication. Compulsive domestication is treated somewhat in the literature. But since, as

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470. See, e.g., DEL. GEN. CORP. L. §§ 388, 389, DEL.CODE ANN. tit. 8, §§ 388, 389 (1993); NEB. REV. STAT. §§ 21-20,122 - 21-20,124 (1991); 15 PA. CONS. STAT. ANN. §§ 4161 - 4162 (Supp. 1994). The domestication provisions of UTAH CODE ANN. §§ 16-10-51.5 - 16-10-51.7 (1991) were repealed by L. 1992 ch. 277, effective July 1, 1992 when the REV. MODEL BUS. CORP. ACT (1984) was adopted in Utah.

471. See also Kozyris, *supra* note 450, at 61-62.

472. Also, domestication does not withdraw diversity of citizenship for purposes of federal jurisdiction from the domiciled alien corporation, see, e.g., LEFLAR ET AL., *supra* note 11, at 719-20 and 30; RABEL, *supra* note 5, at 185-86; ROTH, *supra* note 292, at 57; 19 C.J.S. *Corporations* § 887 (1990).

473. *State ex rel. Cartwright v. Hillcrest Inv. Ltd.*, 630 P.2d 1253 (Okla. 1981).

far as I can see, it is not in force in any state as of today,<sup>474</sup> it will not be examined here.

## 5. State Taxation of Foreign Corporations

Some states enacted specific differentiating tax regulations, particularly so-called "retaliatory statutes" in the area of taxation. These statutes substitute the tax legislation of the state of the corporation's doing business by a specific compensating tax rate, if the taxation of the home state burdens the corporation more heavily than the taxation of the state of doing business. Thereby, it is sought to take away the incentive to do business in another state in order to avoid the tax laws of the state of incorporation.<sup>475</sup>

### *a. Equal Protection Clause*

Independently from the review under the Dormant Commerce Clause,<sup>476</sup> the Equal Protection Clause becomes applicable for the review of these state retaliatory statutes or taxation of foreign and alien corporations in general according to traditional jurisprudence merely after the foreign corporation has been admitted to do business in the state.<sup>477</sup> Cases point out the applicability of the rational basis test, that is, a taxation must stand in a rational relation to a legitimate state interest as the goal striven for.<sup>478</sup> The Equal Protection Clause does not require, as it is sometimes also phrased, that foreign and domestic corporations are subjected to identical taxation or an

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474. So far, illustrations of this concept were Mississippi and Oklahoma. MISS. CODE ANN. § 79-1-19 (1973), however, was repealed in 1987, when the Rev. Model Bus. Corp. Act was adopted in Mississippi with few changes. OKLA. STAT. ANN. § 18-1199(a) (1971) was repealed in 1986. Obscurely enough, modern treatises (*see, e.g.,* LEFLAR ET AL., *supra* note 11, at 719 n.30) still cite as examples cases from the beginning of the century applying statutes which no longer exist.

475. *See* Russ, *supra* note 413; citations in 17A FLETCHER CYC. CORP. §§ 8461, 8802 (1987).

476. *See generally* Jerome R. Hellerstein, *State Taxation under the Commerce Clause: An Historical Perspective*, 29 VAND. L. REV. 335 (1976) (addressing the constitutionality of state tax statutes under the Commerce Clause without special consideration of foreign corporations).

477. *See* Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981); WHYY, Inc. v. Glassboro, 393 U.S. 117 (1968); *see also* 18A FLETCHER CYC. CORP. § 8850 (1987); Congressional Research Service *supra* note 30, at 1716-17. *See also supra* part IV.A.3-5.

478. *Western & S. Life Ins.*, 451 U.S. at 668.

identical tax rate in every case.<sup>479</sup> In *Western & Southern Life Insurance Co. v. State Board of Equalization*<sup>480</sup>—while using rational basis review—the interest attempted to be achieved by the state in setting up a differentiating taxation was not seen in obtaining tax income from noncitizens, but in favoring interstate commerce of domestic corporations by deterring other states from enacting excessive or discriminatory taxes.<sup>481</sup> This was considered a legitimate goal, thereby upholding a California retaliatory tax regulation.<sup>482</sup>

In *Metropolitan Life Insurance Co. v. Ward*,<sup>483</sup> the Supreme Court held by a five to four majority that discriminatory taxation of out-of-state insurance companies presents a violation of the Equal Protection Clause. Both justifications put forward for the discrimination, that is, the incentive to found new insurance companies in the legislating state, Alabama, and the incentive for foreign insurance companies to invest capital in assets on Alabama territory, were refused by the Court already under the rational basis test. Favoring domestic industry by imposing (tax) burdens on foreign companies was considered to present, in the formulation of Justice Powell, the very type of parochial discrimination the Equal Protection Clause sought to avoid.<sup>484</sup> On the other hand, it is acknowledged that a state may subsidize local companies without making the benefits available to foreign companies in the same manner,<sup>485</sup> whereby the bounty theory mentioned previously<sup>486</sup> plays an important role.<sup>487</sup> Admission fees for doing business in the state, whether or not characterized as a tax, according to traditional doctrine cannot violate

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479. *Cheney Bros. Co. v. Massachusetts*, 246 U.S. 147, 157 (1918); *Baltic Mining Co. v. Massachusetts*, 231 U.S. 68, 88 (1913). For an extensive treatment of the older cases compare Sholley, *supra* note 184, at 567.

480. 451 U.S. 648 (1981).

481. *Id.* at 668-70.

482. *Id.* at 671.

483. 470 U.S. 869 (1985).

484. *Id.* at 878-79. Previously, Justice Powell, dissenting in *Schweiker v. Wilson*, 450 U.S. 221, 244-45 (1981), called for a fair and substantial relation between the differentiation and the desired legislative goal as an intensification of the traditional view; see also Note, *Taxing*, *supra* note 250, at 897-98. See also the comments by Cohen, *supra* note 389, at 9-15. Similarly in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984), state tax laws solely motivated by economic protectionism had been held to violate equal protection.

485. *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (line of argument merely under the Commerce Clause); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); Cohen, *supra* note 389, at 21-22.

486. *Supra* part X.A.8.

487. One could raise the objection that subsidies ultimately are nothing else but a side-inverted tax.

the Equal Protection Clause, because the alien or foreign corporation is not considered to be able to invoke its protection before being admitted to do business in the state.<sup>488</sup>

As one of the important results it has to be emphasized that already under the rational basis test according to current jurisprudence the protection of local economic interests (also state protectionism) cannot serve as the only reason for a discriminatory taxation, particularly higher taxation, between domestic and out-of-state as well as out-of-country corporations, insofar as the regulation ties the disadvantages (taxes) to an identical set of facts.<sup>489</sup> The same result has been reached under the intermediate scrutiny standard proposed in this article.<sup>490</sup>

For state retaliatory statutes, in principle, a discriminatory situation will be lacking. These statutes serve precisely to prevent a discrimination of nationals or residents. It is the goal of differentiation of these statutes to avoid disadvantages for domestic corporations, which stem from a lax legislation in the home state (state of incorporation) of the foreign corporations,<sup>491</sup> so that the latter achieves an advantageous competitive position. Nevertheless, the retaliatory legislation may not cause the foreign corporation all in all is more heavily taxed for the identical activity than the domestic corporation.

### *b. Due Process Clause*

According to the Due Process Clause, the legislative jurisdiction of the state may not reach over its territorial boundaries and subject income of corporations to its taxation that originates in activities outside the state boundaries. This doctrine of "minimum contacts," i.e., the requirement of minimum contacts between the state and the regulative object here the object

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488. 18A FLETCHER CYC. CORP. § 8851 (1987); *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494 (1926); *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181 (1888); *State v. Int'l Harvester Co.*, 25 N.E.2d 242 (Ind. 1940).

489. See ROTUNDA ET AL., CONSTITUTIONAL LAW, *supra* note 32, at 801-02, as well as *Metropolitan Life Ins. v. Ward*, 470 U.S. 869 (1985) and *Williams v. Vermont*, 472 U.S. 14 (1985).

490. See *supra* part IX.A.4-5.

491. See 17A FLETCHER CYC. CORP. § 8802 (1987).

of taxation,<sup>492</sup> under the Due Process Clause refers to domestic and foreign corporations the same way.<sup>493</sup>

### c. Commerce Clause

Under Commerce Clause doctrine, state taxation of foreign corporations and alien corporations has to meet the following criteria: (1) The state tax statute may include a non-discriminatory, appropriately assessed corporate income tax for those corporations that do exclusively interstate commerce, if the tax stands in relation to the local activities of the corporation and can be viewed as a fair and reasonable consideration for them;<sup>494</sup> (2) under the Commerce Clause interest balancing approach a tax will be unconstitutional, if it burdens commerce in an unfair manner by absorbing more than a just share from the interstate activity;<sup>495</sup> (3) a state has the power to raise regular property taxes from the assets with in-state situs, even if those are used in interstate commerce;<sup>496</sup> (4) the mere fact that a foreign corporation is doing business in interstate commerce does not relieve it from local tax burdens as to the interstate commerce;<sup>497</sup> (5) a state tax on the privilege of doing business within the state is not per se unconstitutional under the Commerce Clause, even if it relates to an activity that is part of interstate commerce. It must merely be certain that the tax bears a sufficient nexus to the taxing state, that it is fairly connected to the advantages granted by the state to the corporation taxed, that it does not discriminate against interstate commerce, and that it is fairly assessed for local activities.<sup>498</sup> Additionally,

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492. See *Quill Corp. v. North Dakota ex rel. Heitkamp*, 112 S.Ct. 1904 (1992); *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954); 18A FLETCHER CYC. CORP. § 8849 (1987). For a comprehensive treatment of the minimum contacts doctrine see *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); SCOLES & HAY, *supra* note 11, at 294-308 and 327-49.

493. *ASARCO, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982); *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203 (1925); 18A FLETCHER CYC. CORP. § 8849 (1987).

494. See particularly *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100 (1975); *General Motors Corp. v. Washington*, 377 U.S. 436 (1964).

495. *Department of Revenue of Washington v. Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978).

496. *Norfolk & W. Ry. v. Missouri State Tax Comm'n*, 390 U.S. 317 (1968); *International Shoe Co. v. Shartel*, 279 U.S. 249 (1929); *Atlantic & Pac. Tel. Co. v. Philadelphia*, 190 U.S. 160 (1903).

497. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100 (1975).

498. *Quill Corp. v. North Dakota ex rel. Heitkamp*, 112 S.Ct. 1904 (1992);



if the state taxation is applied to foreign, as distinguished from interstate commerce or, more often, to foreign corporations meaning "alien" in the context of the Foreign and Interstate Commerce Clause, (6) the tax, despite its appropriateness, may not create a substantial risk of international multiple taxation, and (7) may not prevent the government to speak with one voice when shaping its economic relations with foreign countries.<sup>499</sup>

It becomes obvious at this point that as to discriminatory state legislation in the field of interstate commerce,<sup>500</sup> in practice the Commerce Clause takes on a role presiding over the Equal Protection Clause. This might particularly be so, because due to traditional doctrine the Equal Protection Clause, on the conflict of constitutional laws level, was not applicable to foreign corporations before qualification. Nevertheless, the Equal Protection Clause is relevant after admission for discriminating regulation, particularly taxation, in intrastate commerce.

## X. CONCLUSION

### A. *Standard of Review*

1. Under traditional doctrine, different standards are applied to differentiated treatment of alien natural persons and U.S. citizens under the Equal Protection Clause. Discriminating state legislation is reviewed under strict scrutiny. Consequently, it has to be necessary for the realization of a compelling state interest, i.e., be the less restrictive means to achieve the state interest. However, if the regulations concern political functions in the states or restrictions for illegal or nonimmigrant aliens, a weaker standard of review, probably rational basis review, is used. Consequently, the classification merely has to be rational in relation to the goal striven for, which provides the legislator with ample discretion. All federal differentiations, on the other hand, are only subject to the feeble rational basis test, particularly due to the wide federal power in this area of law.

It appears persuasive to follow the suggestion of some authors and apply intermediate scrutiny to all classifications on grounds of nationality, i.e. alienage. This would establish consistency between the several lines of cases

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Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977); 18A FLETCHER CYC. CORP. § 8838 (1987). See generally ROTUNDA ET AL., CONSTITUTIONAL LAW, *supra* note 32, at 721-39, 767-83; Congressional Research Service, *supra* note 30, at 221-26; Stenger & Gwyn, *supra* note 292, at 721-22.

499. Wardair Canada Inc. v. Florida Dep't of Revenue, 477 U.S. 1 (1986); 18A FLETCHER CYC. CORP. § 8838 (1987).

500. See also ROTUNDA ET AL., CONSTITUTIONAL LAW, *supra* note 32, at 770-72, offering extensive citations of Supreme Court cases.

and, furthermore, besides a greater practicability and clarity, live up to the significance of "nationality" as criterion of differentiation. Under intermediate scrutiny, which is generally used for quasi-suspect classifications and for impairment of quasi-fundamental rights, a differentiation is justified, if it (1) serves an important governmental objective and (2) stands in an essential relation to realization of this goal.

2. Unequal treatment of alien or foreign corporations is rarely discussed by courts or commentators and is traditionally reviewed merely under the rational basis test. However, in the recent decision of *Metropolitan Life Insurance Co. v. Ward*, this standard of review received somewhat more bite, because protecting the local economy is no longer accepted as a justification under the rational basis test, so that a discrimination for the discrimination's sake is prohibited.

3. This Article argued for extending equal protection doctrine used for alien natural persons to foreign and alien corporations analogously. The criterion of differentiation of foreign or alien corporate nationality fulfills several of the factors developed for defining a suspect criterion, which triggers strict scrutiny, in differing intensities. Furthermore, strong parallels to the criterion of differentiation of alienage in the case of natural persons come to mind. Therefore, the criterion of differentiation of corporate nationality is at least to be characterized as quasi-suspect. At the same time trans-border economic activities of foreign or alien corporations at least touch upon a fundamental right up to now recognized by the Supreme Court in a different context, that is, the right to interstate migration, which with respect to the fundamental right branch of the Equal Protection Clause according to traditional doctrine, may also provoke strict scrutiny review. Consequently, for a differentiation on account of corporate nationality the factors are fulfilled that ask for at least intermediate level scrutiny. Argumentatively, you could probably even consider applying strict scrutiny. Under intermediate scrutiny, a state or federal unequal treatment can only survive if it (1) serves an important governmental goal and (2) stands in an essential relation to the achievement of this goal. This standard of review should apply both to discriminations against alien corporations and foreign corporations. According to a modern concept, particularly due to the concept of subjection and a modern view of the "within its jurisdiction" formula of the Equal Protection Clause, it is also irrelevant whether the alien or foreign corporation fulfilled or even had to fulfill the requirements of qualification. Intermediate scrutiny, finally, has to be applied evenly to state and Federal unequal treatment of foreign corporations, in the case of traditional discrimination as well as in the constellation of reverse discrimination. State constitutional general equal protection provisions have not been treated in depth in this article, but in general they should not establish a stricter standard of review. State special

equal protection clauses for corporations, in addition, are mostly phrased or drafted in a protectionistic manner and prevent solely reverse discrimination, i.e., discrimination of nationals.

4. Under the Privileges and Immunities Clause which protects solely "fundamental activities," also a heightened standard of review is applied, even if its characterization as intermediate scrutiny or strict scrutiny is debated. This constitutional clause, however, according to the perspective of conflict of constitutional laws is neither applicable for foreign nor for alien corporations. The Impairment of Obligations of Contract Clause, on the one hand, is applicable for alien and foreign corporations only after qualification in the state. On the other hand, despite its phrasing, it does not possess absolute character according to the traditional view of the courts, but rather it allows a justification under a standard of review similar to equal protection strict scrutiny.

5. The Dormant Commerce Clause kicks in, if state regulations touch upon foreign or interstate commerce. State restrictions of interstate commerce violate the Commerce Clause, on the one hand, by directly discriminating against persons of other states or in interstate commerce. On the other hand, the Commerce Clause prohibits indirect discrimination as far as it excessively burdens interstate commerce and is not justified by local benefits. State restrictions on foreign commerce are only accepted, if on top of the requirements already mentioned, they do not impair national unity or, in the special constellation of tax legislation, do not enlarge the risk of multiple taxation. Under a comparative perspective within the Constitution itself,<sup>501</sup> consequently, unequal treatment is reviewed under the Commerce Clause by a sort of strict scrutiny. But the range of application of the Commerce Clause is in substance restricted to state discriminations against or, within foreign commerce and interstate commerce. Thus, federal discriminations and state discriminations in intrastate commerce are left out. As a consequence, the Equal Protection Clause becomes particularly relevant for state measures regulating intrastate commerce, furthermore for federal actions, which, however, have not been a big topic in Supreme Court cases so far. This is perhaps precisely because of the Supreme Court's concept of the feeble rational basis test. Besides, for many of the areas of law economically relevant for foreign and alien corporations the legislative power lies (also) with the states.

6. Consequently, an intensified standard of review, at least matching equal protection intermediate scrutiny, is uniform under the similar constitu-

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<sup>501</sup>. "Internally comparative." See definition in note 303, *supra*.

tional safeguards in fact, or, due to their structure, potentially protecting alien or foreign corporations or generally transborder commerce, that is, under the Impairment of Obligations of Contract Clause, the Commerce Clause and the Privileges and Immunities Clause. This supports, as a systematic argument, the correctness of the application of intermediate scrutiny under the Equal Protection Clause for differentiations on grounds of foreign or alien corporate nationality suggested in this article.

### *B. Practical Application of the Standard of Review*

1. By declaring a discrimination against foreign or alien corporations unconstitutional under the proposed intensified standard of equal protection review precisely because of their foreign or alien nationality, or their lack of "citizenship," an important stage seems to have been reached already: The criterion of differentiation, corporate nationality, and the goal of differentiation may not be congruent. In addition, in my view, only those reasons that are not already fused with the wider notion of corporate nationality may be used as a justification of the differentiation: In each case an independent goal of differentiation is necessary, that under the proposed intensified review standard of intermediate scrutiny, serves an important governmental objective and stands in an essential, i.e., proportional (fit, necessary and appropriate) relation to the achievement of this goal.

The qualitative requirements of the justification are not met by the goals of differentiation of general protection of local economy, general protection against alien control, unspecified reference to a key industry or a specific sector of business with its specific needs, protection of national interests, the alleged lacking consent to U.S. economic policy or the protection of domestic employees against unemployment. Establishing a discriminatory general permit requirement not motivated by specific dangers of the subject matter or important governmental interests, particularly such requirements where the permit is subject to unspecified discretion of the (administrative) agency, violate the Equal Protection Clause. On the other hand, the protection of national security, of third parties, of domestic legal relations, particularly consumers, provide valid justification. In certain economic sectors to be examined in the individual concrete cases, specific differentiating regulations for alien or foreign corporations will withstand scrutiny, if they are not motivated by the protection of the domestic enterprises of the specific sector, but if they enforce certain supervisory control powers or tasks to protect the greater public, the consumer or the domestic legal relations (third parties) such as, for instance, in the sectors of bank supervision, production of nuclear energy, or supervision of aviation.

2. For the latter justifications, which are basically permissive, it is decisive to maintain proportionality in the relation of goal of differentiation

and criterion of differentiation in the individual case. Proportionality is in particular to be observed in the context of the reciprocity criterion, a criterion of differentiation in principle acknowledgeable, for which, in the first place, connexity of the right retained as a pawn and the right striven for abroad has to be considered closely and, in the second place, in a particularly strict manner the fitness, necessity and especially appropriateness (proportionality) of the relation of goal of differentiation and alien corporate nationality. The so-called bounty theory, according to which the government may freely differentiate when providing public services and benefits, is problematic, insofar as at least the definition of a public benefit has to be narrowly tailored to avoid the possibility of reformulating each and every restriction as simply the refusal of benefits. Also, the imposition of discriminatory formal requirements, such as disclosure or reporting obligations, reaches the threshold of a potentially unconstitutional discrimination, i.e., threshold of relevance, and may solely be upheld, if in the individual constellation important governmental objectives closely tailored to the specific subject matter are pursued and the extent and the expense of the formal requirements are fit, necessary, and appropriate for achieving the goal of control.

Thus, one has to point out with certain regrets, that it becomes obvious that economic restrictions for foreign corporations equipped with a reciprocity requirement, narrowly tailored and consequently satisfying the proportionality principle cannot be overcome even by using the intensified standard of equal protection review developed in this article, but are left dependent on international and supranational non-discrimination clauses. Alternatively, the overall level of protection rises when other countries drop discriminations of alien corporations in their statutory law on their own, thereby decreasing the range of actual applicability of restrictions based on reciprocity. In this regard, the intensified standard of review, however, initiated a stronger connexity and strict proportionality between the "pawn" and the protection desired for the nationals in alien law.

3. Land ownership restrictions must meet strict requirements. Ownership restrictions based simply on the intention to prevent any economic influence by alien corporations violate the qualitative requirements for the goal of differentiation. A complete prohibition to acquire land appears disproportionate in any case, because the lack of an exemption for necessary office or business premises amounts, particularly when additionally applying the control theory, to an exclusion of alien corporations from instate business activities. Specific and proportionate restrictions motivated by the prevention of land speculation, by conserving agricultural land or by the protection of certain military and strategic zones are permitted.

State qualification statutes could gain the status of unconstitutionality under the intensified equal protection standard of review due to lack of necessity to protect instate legal relations by creating an instate forum to sue,

if the modern conception will gain force that the statutes' function is taken over by the modern long arm statutes and that the notion of doing business has been out dated by the Supreme Court's jurisprudence on the requirement of minimum contacts under the Due Process Clause. Facultative domestication statutes do already not amount to a technical discrimination, since by a mere procedural act they precisely intend to establish equal treatment for alien corporation in regard to their intrastate activities with domestic corporations—at least in the field of corporate law.

